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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1459

[redacted], *ex rel.*
ERNEST FEELINGS,

Petitioner,

v.

EUGENE LEFEVRE, *Superintendent, Clinton Correctional Facility, New York,*

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Clinton Correctional Facility, New York,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment entered on December 21, 1978, by the United States Court of Appeals for the Second Circuit, affirming the decision and judgment of the United States District Court for the Eastern District of New York (Weinstein, *J.*) which dismissed petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Opinion and Proceedings Below

The only opinion is that of the District Court, set forth in Appendix A hereto. It has not been reported. The Second Circuit (Feinberg, Mulligan and Gurfein, *C. JJ.*) affirmed the judgment of the District Court without opinion. Petitioner moved for reargument of the appeal. The motion for reargument was denied by the same panel in an order entered February 22, 1979.

There are no reported opinions from the underlying New York State proceedings. Petitioner was tried on an indictment for felony-murder in the Supreme Court of the State of New York, Kings County, before Hon. Hyman Barshay and a jury. Pretrial *Wade* and *Huntley* suppression hearings were held before Justice Barshay on December 1 and 2, 1971. Trial was held on March 13-20, 1972, resulting in a verdict of guilty. Judgment of conviction of petitioner was entered September 15, 1972, and the trial court affixed a sentence of imprisonment of twenty years to life.

Petitioner's appeal of his conviction in state court was summarily affirmed by the Appellate Division, Second Department, on March 19, 1975, and petitioner's application for leave to appeal to the New York Court of Appeals was denied on July 19, 1975. In 1973 petitioner sought vacation of his sentence through a *coram nobis* proceeding in state court, but his petition was denied and the denial affirmed in the 1975 appeal.*

Jurisdiction

The jurisdiction of this Court is based upon 28 U.S.C. § 1254 (1).

* There were also proceedings in New York State court before Hon. Vincent Damiani involving co-defendants of petitioner tried separately in 1969. These proceedings, of which there are again no reported opinions, are described more fully in the Statement of the Case below.

Statutes Involved

Constitution, Amendments V and and XIV, § 1:

Amendment V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * *

Amendment XIV. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Question Presented

Was petitioner's alleged confession improperly introduced in evidence against him at his trial, in violation of

his rights of due process under the Fourteenth Amendment, when that confession was obtained pursuant to New York's procedures of "delayed arrest" by which the need to advise petitioner of his rights to remain silent and to counsel were delayed past the point when arraignment was required?

Statement of the Case

By his petition in this case petitioner seeks this Court's review of a pattern of arrest which New York has followed for many years in homicide cases. This pattern, which was followed in this case, involves a two-step arrest process. The first "arrest" is the actual apprehension and taking into custody of the suspect by the police. The second "arrest"—the formal arrest—comes only later when the suspect is brought before a State assistant district attorney. Only after the second "arrest" are steps begun leading to court arraignment. In between the two "arrests", as happened in this case, police interrogation continues, with the suspect being given *Miranda* warnings or otherwise accorded meaningful Constitutional safeguards only after the police have firmly secured his willingness to confess and the nature of his confession.*

As the particular and unusual facts in this case demonstrate, while this two-step procedure has the appearance of affording additional protection to suspects in police custody, in actual practice it has an inherent susceptibility to let Constitutional safeguards fall by the wayside. Here the procedure resulted in a conviction based almost exclusively

* For a recent case involving New York's "police procedure requiring" this two-step process "prior to an arrest for homicide," *see People of the State of New York* v. *De Jesus*, 63 A.D.2d 148, 150, 407 N.Y.S.2d 5, 7 (1st Dept. 1978). *See also People of the State of New York* v. *Stroh*, 63 A.D.2d 326, 327, 408 N.Y.S.2d 77, 78-79 (2nd Dept. 1978).

on a highly suspect confession attributed by the police to petitioner.*

The Crime

The events in this case involve a robbery and murder committed at the Leonard Electrical Company in Brooklyn, New York, on December 1, 1967.** About 4:15 p.m. on that day, which was a Friday, three armed men entered the management offices of the company, where the week's payroll had just been delivered. In the course of the robbery, which lasted only minutes, one of the three men went into the inner office of the company's president, Nathan Leonard, and in a brief altercation fatally shot Mr. Leonard. As the three men retreated from the offices, an

* The facts recited in the Statement of Facts are not taken solely from the record of petitioner's trial relied upon by Judge Weinstein in his opinion (Appendix A). The reason for this is that there are two trial records which contain the relevant facts, petitioner's trial in 1972 and the trial of four of his co-defendants three years earlier in 1969. Trials widely separated in time had been occasioned because, from shortly after his arrest in early 1968, petitioner had been committed to Matteawan State Hospital as legally insane and hence incompetent to stand trial. He was not released from Matteawan until December 1970, after the completion of proceedings involving the four co-defendants.

In the habeas proceeding in the District Court below, Judge Weinstein had only petitioner's trial record. He did not have the much longer and more detailed record of the earlier trial involving petitioner's co-defendants. The transcript of the earlier proceedings was obtained only in connection with petitioner's appeal to the Second Circuit, when the undersigned was first assigned as petitioner's counsel. That record had been stored in a basement piperoom in the New York State Supreme Court building in Brooklyn and was found by the undersigned with the kind help of John R. Addeo of the New York State Criminal Appeals Bureau. A review of the transcript of the 1969 co-defendants' trial showed that Judge Weinstein had only a partial view of the facts relevant to petitioner's application for habeas relief.

** References "... .a" are to Judge Weinstein's opinion in the Appendix. References "1969 R.." and "1972 R.." are to the respective records referred to in the preceding footnote. The general description of the robbery is taken from the *Wade* and *Huntley* hearings involving petitioner (1972 R20-266), but there are no material discrepancies between the 1972 record and the 1969 record until the facts regarding petitioner's arrest.

employee of the company, Harold Abrams, tried to grapple with the man who had shot Mr. Leonard. In the scuffle Mr. Abrams was himself shot twice by the same man and was seriously wounded. The three robbers then escaped.

Officers of the New York police department arrived at the company within a few minutes of the shooting. Among the officers were Detectives Caltagirone and Rinaldi, the two detectives who were to remain in charge of the investigation of the crime throughout all subsequent events.

Investigation of the Case

Under their direction, the police began to assemble what information they could about the crime. Despite the presence of several employees of the company who had witnessed the shooting, the police obtained no positive identifications of any of the three men who had entered the company's offices (1969 R905-6). A suspect's sketch was made as a result of questioning the employees which showed the man who killed Mr. Leonard and shot Mr. Abrams to be a Black with an Afro haircut. However, the particular description of the assailant given by Mr. Abrams to the police later in the hospital was of a Black who had been wearing a hat. A second employee, Barry Anderson, gave a description of the assailant as a Black with straight hair rather than an Afro. (At petitioner's trial, it was established that the time during which the assailant was observed amounted only to "seconds" and both Abrams and Anderson were unable to remember details of the assailant's features or dress (1972 R352-74).)

The police knowledge of the crime was improved on December 3, 1967. On that day a man named George Wilson offered to give the police some information about the crime in return for money. Wilson, who feared that he was possibly being "fingered" as a suspect by other members of his family, gave the police three names to check out: John Wilson, Herman Fillyaw and Morse Fillyaw. All three of these individuals were related to each other and to George Wilson (1969 R1007).

As a result of this lead, the police, under the direction of Detectives Caltagirone and Rinaldi, took John Wilson and the two Fillyaws into custody on December 4, 1967 and questioned them about the crime throughout the night. They did not, however, arrest them, and they did not give them any *Miranda* warnings (1969 R149-50, 1120-22). All three had alibis concerning their whereabouts at the time of the crime on December 1st, although the police did learn that John Wilson had once been employed by the Leonard Electrical Company and was familiar with the layout of the company's offices and the routine followed for the company's weekly payroll. The police also learned that the two Fillyaws had a plumbing truck at their disposal that day (1969 R140-147).

From their questioning on the night of December 4, the police obtained another lead, the name and address of a woman named Johnnie Mae Zimmerman, the wife of Willie Brigham (1969 R296). The police questioned Miss Zimmerman on December 8, 1967 and obtained a photograph of Brigham from her (1969 R296). From this they were later able to obtain photographs of Brigham from the State's Bureau of Criminal Investigation, which they subsequently showed several times to Mr. Abrams in the hospital (1969 R903).

This was essentially the extent of the police's knowledge about the crime through December and into early January: the attempt by George Wilson to implicate his three cousins in order to throw suspicion off of himself, and the names of four suspects who had enough familiarity with the location and routine of the Electrical Company to have committed the crime but three of whom, at least, had given alibis. Up to this time the police had no information of any kind about petitioner, not even his name, and they had no clue about who among their suspects might have actually fired the shots which killed Mr. Leonard and wounded Mr. Abrams.

Petitioner's Arrest

On January 8, 1968, the police received an anonymous tip that Brigham could be found that afternoon in an apartment at 330 Greene Avenue in Brooklyn (1969 R295). This tip, according to the testimony of Detectives Caltagirone and Rinaldi, also gave the police for the first time a name associated with petitioner ("Snooky") as a suspect in the crime and a friend of Brigham. It is not clear, however, whether the police at this point had petitioner's actual name or only the name "Snooky" (1972 R85; 1969 R91).

At about 2:30 p.m. the two detectives, accompanied by other officers, went to the apartment at 330 Greene Avenue. They had no arrest or search warrants with them (1969 R754). They knocked on the door and identified themselves either by saying the name "Snooky" or identifying themselves as "Police".* A voice from inside said "Wait a minute", but no one came to the door. After a short pause, the police broke down the door. They found no one in the apartment, but in the rear courtyard two officers who had been stationed there to block any escape were in the process of apprehending two partially clad men, Brigham and petitioner.

The police let the two men return to the apartment to dress more warmly. The police also confiscated narcotics paraphernalia and an amount of drugs which were in the apartment (1972 R208). (Brigham later testified that he had taken heroin that morning (1969 R655-58), and petitioner himself was subsequently treated for withdrawal symptoms at Lutheran Hospital in Brooklyn about 3 a.m.

* This discrepancy is significant. If the police hoped to lure Brigham out of the apartment by using the recently acquired name of his friend ("Snooky"), it indicates that they did not expect to find petitioner inside the apartment. It was at the 1969 trial that the testimony shows the police used the word "Snooky" at the apartment door (1969 R91). At the 1972 trial of petitioner, the testimony is that the word "Police" was used (1972 R85). It is thus not clear from the record whether the anonymous tip on January 8 indicated petitioner's involvement in the crime, although the 1972 record is to the effect that the tip directly implicated petitioner.

on January 9, or about twelve hours after his arrest (1972 R226, 281).)

This was the first of petitioner's two "arrests". The second would not come until after his alleged confession. At the time of the arrest at Greene Avenue the police at least informed Brigham that he was being taken into custody in connection with the Leonard Electrical Company crime and that they "had information that he was involved in this stick-up" (1969 R312-13). There is no indication that they made a similar disclosure to petitioner upon arrest, although it is clear that during the course of the afternoon they interrogated petitioner about whether he had been involved in the crime, which he denied (1972 R90-91).

The police handcuffed petitioner en route to the 68th Precinct in Brooklyn and drove him there in a car separate from that used to take Brigham to the precinct. There was further questioning of petitioner at the precinct about the robbery, but no inculpatory statements were obtained from him (1972 R91-96). Brigham continued to be kept separate (1972 R100-12). Neither at the time of petitioner's arrest nor during any of the questioning following it that afternoon, either in the Greene Avenue apartment, in the squad car or at the precinct, was either petitioner or Brigham given any *Miranda* warnings. Neither petitioner nor Brigham was booked, arraigned or fingerprinted upon arrival at the precinct, or at any time during the course of the afternoon and early evening.

At 5:05 p.m. the first of two line-ups was conducted of petitioner and Brigham. The first was held at the precinct. Four Black policemen in civilian clothes were used to fill out the line-up, which was observed by three of the company employees who had witnessed the robbery, Evelyn Paccione, Aldo Arnone and Mr. Anderson.* Arnone and

* Mr. Arnone is called "Al Roney" by Judge Weinstein in his decision below (27a).

Paccione were unable to make identifications, but Anderson identified both Brigham and petitioner. There was no counsel present on behalf of either suspect at the line-up (1969 R315, 551-56, 888-93; 1972 R58).

The police then took Brigham and petitioner, again in separate cars, to the hospital where Abrams was still recovering from his gunshot wounds. Between 6:20 and 6:30 p.m. a second line-up was conducted at the foot of Abrams' hospital bed, with the same four Black police officers filling out the line. Abrams identified both Brigham, whose pictures he had previously been shown by the police, and petitioner. Again no counsel was present. Still no *Miranda* warnings had been given to either Brigham or petitioner (1969 R81, 221, 314-15, 901-05; 1972 R42-47, 58).

The two suspects were driven back to the precinct in the customary separate cars, reaching the precinct between 6:30 and 6:35 p.m. Shortly thereafter, according to the testimony of Detectives Caltagirone and Rinaldi, petitioner allegedly stated his desire to make a statement "because they crossed me", and a statement supposedly made by petitioner was thereafter taken by the two detectives in their notebooks, soley in their presence. The statement, if true, not only implicated petitioner in the Leonard Electrical Company robbery, but contained an admission that it was petitioner, and not any of the others, who fired the fatal shots (1972 R97-142).

The Problem of When
Petitioner Was Given Miranda Warnings

According to both Caltagirone and Rinaldi, as soon as petitioner expressed his desire to make a statement, they first advised him of his rights by use of a police form containing the standard *Miranda* warnings. They testified that they read him the warnings one at a time, recorded his answers on the form, and had him sign the form. They testified that this was the first time since his being taken into custody that petitioner was advised of his rights under *Miranda* (1972 R104-11, 162-68).

But the detectives' testimony, when probed in the light of the 1969 proceedings, is unreliable—far more so than the District Court realized. The *Miranda* form sheet which was used to take down petitioner's responses bears the time 7:10 p.m., written in by Detective Caltagirone (1972 R101). However, the transcriptions contained in the two detectives' notebooks of the statement allegedly given by petitioner contain time notations of "6-4 p.m." (Caltagirone's notebook) and "6:45 p.m." (Rinaldi's notebook)—in both instances some half an hour *before* the time notation on the *Miranda* sheet (1972 R125-27, 156).

In their testimony at the *Huntley* hearing prior to petitioner's 1972 trial, the detectives tried to explain that this discrepancy was inadvertent and that they were sure petitioner had been advised of his rights before any statement was taken (1972 R153). Thus on the first day of the *Huntley* hearing, Detective Caltagirone testified that the notation "6-4", which he said meant 6:40 to 6:49 p.m., was a mistake. He testified that the statement transcribed in his notebook was taken after 7:10 p.m., the time he had noted on the *Miranda* sheet, and that the *Miranda* sheet was accurate. This coincided with Caltagirone's testimony that he had spoken to petitioner for "ten or fifteen minutes" prior to "the exact time when he said he wanted to tell the truth" (1972 R102) and with the fact that recording petitioner's alleged statement itself took at least fifteen to twenty minutes (1969 R305).

When Detective Caltagirone resumed the stand on the second day of the *Huntley* hearing, however, defense counsel cross-examined him on the basis of his testimony at the 1969 trial of petitioner's co-defendants. There Caltagirone had testified that the *Miranda* sheet was in error and that the "6-4" annotation in his notebook next to petitioner's alleged confession was correct (1972 R125-30). On the basis of this cross-examination, Caltagirone corrected his testimony of the first day, now stating that the

notebook was right and the *Miranda* sheet in error. He remained sure that in any event the *Miranda* warnings had been given first.

Detective Rinaldi followed Caltagirone on the stand at the *Huntley* hearing. He confirmed the time of petitioner's alleged confession has having begun abount 6:45 p.m., the time entered in his notebook next to his transcription of petitioner's alleged confession. He also confirmed, on the basis of a marginal notation in his notebook reading "Advised of his rights" (without any hour indicated), that petitioner had been read his Constitutional rights before allegedly confessing. Detective Rinaldi said such a notation was his usual practice (1972 R154-60).

On cross-examination, however, it was established that such notations were not contained next to all the confessions of petitioner's four co-defendants who had been tried in 1969. There were notations next to the notebook statements of two others arrested on January 8 (Brigham and Morse Fillyaw), but there were none next to the statements of Herman Fillyaw and John Wilson. Wilson's statement in Rinaldi's notebook, it turns out, had been a trial exhibit at Wilson's trial in 1969, and the statement of Herman Fillyaw had been ordered sealed by Justice Damiani at Wilson's trial by taping pages of the notebook (1969 R1449). These pages had remained sealed until Detective Rinaldi took the stand on the second day of petitioner's *Huntley* hearing, when Justice Barshay permitted them to be unsealed (1972 R174).

It was also established on cross-examination that Detective Rinaldi had been given his notebook by the prosecutor on the preceding day, and that the prosecutor had discussed with him the "dispute" which had arisen from Detective Caltagirone's inconsistent testimony about the timing of the *Miranda* warnings supposedly given to petitioner (7:10 p.m.) and petitioner's alleged statement as

noted in Caltagirone's notebook (6-4 p.m.). Rinaldi had even been allowed to take his notebook home overnight before taking the stand on the second day of the *Huntley* hearing (1972 R175-77). The opportunity for insertion of marginal notations in Rinaldi's notebook ("Advised of his rights") where no inconsistency could be traced to 1969 is obvious.

Despite the inconsistencies, however, the trial court concluded at the end of the *Huntley* hearing that petitioner's alleged confession, as recorded in the two detectives' notebooks, should be admitted at trial.

At trial, the two detectives generally testified consistently with the sequence of events as established in the second day of petitioner's *Huntley* hearing: that they had given petitioner *Miranda* warnings prior to taking any statement, and that the discrepancy in the times indicated on the *Miranda* form and in their notebooks was an inadvertent error (1972 R406-21). Petitioner's alleged confession was then read at trial to the jury, not just once but five times in all. Petitioner, while he had testified at the *Huntley* hearing of his innocence of the crime and also of his having no recollection of ever having signed any *Miranda* form or made any statement, did not testify at trial.*

The Additional Problems of How Petitioner's Alleged Statement Was Made and Its Relationship to the Arrests of Petitioner's Co-Defendants

From his review of the 1972 record, Judge Weinstein was at least aware that the timing of petitioner's *Miranda*

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* Petitioner's alleged confession was read to the jury five times because, in addition to its being read once by Detective Caltagirone and once by Detective Rinaldi, it was also read as evidence supporting petitioner's rationality in rebuttal of his asserted defense of insanity, it was read in summation by the prosecution, and it was read in paraphrase by the trial court in its charge to the jury (1972 R405-06, 480-84, 529-32, 640-41, 682-83).

warnings was on the surface incompatible with the timing indicated in the detectives' notebooks for petitioner's alleged statement. But he was unaware of additional problems—as was Justice Barshay—which further undermine even the possibility that petitioner was properly informed of his Constitutional rights.

At petitioner's trial, Detectives Caltagirone and Rinaldi testified that petitioner's confession, amounting to several pages in their notebooks, was "verbatim", meaning that it was a consistent narrative, a continuous flow of events as recounted by petitioner (1972 R118-20). This supposed narrative quality of the statement was also relied upon by the prosecution's expert psychiatrist in using the confession to establish petitioner's sanity (1972 R540-42).

In fact, however, at the 1969 trial the testimony of Detectives Caltagirone and Rinaldi had been that petitioner's alleged confession was not in narrative form at all but had been arduously taken down "verbatim" in answer to specific questions over a period lasting from twenty minutes to half an hour, with only the alleged answers but *not* the questions recorded—for "ease" and "continuity" of reading, as they put it (1969 R305-08, 395-96).

If petitioner's alleged statement was thus obtained over a considerable period of time, it is unlikely that it could have been obtained as early as 6:45 p.m., particularly when the detectives testified that they had had some "ten or fifteen minutes" of conversation with petitioner after the hospital line-up before "the exact time when he said he wanted to tell the truth" (1972 R102). However, the subsequent events at the 68th Precinct on the evening of petitioner's arrest suggest that Detectives Caltagirone and Rinaldi must have had petitioner's alleged statement prior to 7 p.m.

In accordance with New York's procedures in homicide cases, the Assistant District Attorney (Alfred Allatin) was called at his home near 7 p.m. and advised to come down to

the precinct because the case seemed to be breaking (1969 R445-46). A stenographer (Robert Machlis) was also called, and both he and Mr. Allatin arrived at the precinct around 7:30 p.m. (1969 R420). In the meantime, instructions had been given by the police about 7 p.m. to arrest the other suspects who had been questioned on the night of December 4, 1967, and these individuals were apprehended beginning that evening: John Wilson at about 8:30 p.m. (1969 R809) and Morse Fillyaw at about the same time (1969 R577). Herman Fillyaw was not arrested until January 10, 1968.

Moreover, petitioner's alleged statement was used by Detectives Caltagirone and Rinaldi to obtain statements from the other suspects. Brigham, *after* being confronted by petitioner, made a statement at 7:25 p.m. (1969 R37, 284). When Morse Fillyaw was brought into the precinct, he too was confronted by petitioner, subsequent to which (9:25) he gave a confession consistent with petitioner's (1969 R60, 268).* Similarly, John Wilson, after he was brought in and again after a confrontation, also made a confession consistent with petitioner's at 9:50 p.m. (1969 R68, 159).** All these initial confessions—petitioner's first (if it was in fact made), Brigham's at 7:25, Fillyaw's at 9:25, and Wilson's at 9:50—were given first *just* to Detectives Caltagirone and Rinaldi, before any of the suspects

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* At the pretrial hearings in 1969, Morse Fillyaw testified that Detective Caltagirone told him to sign the *Miranda* sheet without reading it because "it can't hurt you" (1969 R593), and Caltagirone conceded that he in fact said this to one of the defendants (1969 R135).

** It should be noted that when Wilson was arrested at his home that night, he told his wife in the presence of the arresting officers to call his lawyer, Jerome Sussman, and he gave his wife a card with Mr. Sussman's home telephone number (1969 R578, 581-82). Mrs. Wilson reached Sussman at home (1969 R675). Sussman called in his representation to the 68th Precinct but said he would not come down that night, stating that he would appear at Wilson's arraignment the next day (1969 R698-99). Sussman had left standing instructions with Wilson not to make any statement in his absence (1969 R700), instructions which Wilson curiously did not follow that night.

were questioned in any way by Assistant District Attorney Allatin.

There are further inconsistencies surrounding these statements, however, and they concern the nature of the confrontations with petitioner. At petitioner's *Huntley* hearing, there was testimony that in these confrontations petitioner had himself repeated his alleged statement in the presence of the others arrested that night, although Justice Barshay cut off further inquiry into this subject as "highly prejudicial" (1972 R223-25). The 1969 record is clear, though, that petitioner's alleged statement was *never* repeated by him but was instead read to the others by Detectives Caltagirone and Rinaldi (1969 R21-22).

In addition, after each "verbatim" statement had thus been transcribed by Detectives Caltagirone and Rinaldi in their notebooks, each suspect was taken into another room for "formal arrest" by Assistant District Attorney Allatin, on the record. Petitioner was the first suspect to be questioned by Allatin, but after being given the *Miranda* warnings he refused to give any statement and requested a lawyer (1972 R225; 1969 R473). By contrast, when the others arrested that night—Brigham, John Wilson and Morse Fillyaw—were read *Miranda* warnings by Mr. Allatin, they each repeated the statements they had given earlier to Detectives Caltagirone and Rinaldi (1969 R420-33). Why they did so (in Wilson's case notwithstanding his attorney's instruction) may have been partially for the reasons recorded by Detectives Caltagirone and Rinaldi in their notebooks: *e.g.*, "because they ratted on me" (Brigham) and "because I have nothing to hide" (Wilson) (1969 R37, 60, 68). But each confessed *only* after having heard petitioner's alleged statement in which it was clear, if the confession were accurate, that petitioner alone confessed to holding the gun whose shots killed Nathan Leonard and wounded Harold Abrams (1969 R21, 155-66, 329-30, 373-76). After hearing that alleged confession, all the others who

had known since early December of 1967 that they were suspects in the crime (and were related to each other as well) knew also that at least none of them would be charged with the actual shooting. That would fall on petitioner*

On the night of the arrests, Allatin wrote up his report of the arrests between 10 p.m. and midnight and then "called in the case completed" to the District Attorney's office (1969 R470). Petitioner had not yet been arraigned, and indeed had not been formally "booked". He would not be booked until 2 a.m., just before being taken to Lutheran Hospital for treatment of withdrawal symptoms. He and the others would not be arraigned until the courts opened later that morning, January 9. At arraignment, petitioner was finally assigned counsel, but all proceedings against him were stayed because of his subsequent years of hospitalization (1972 R265-95).

Reasons For Granting The Writ

On the foregoing facts, the writ sought by petitioner should be granted.

First, the potential for use at trial of an improper if not false confession arises clearly from these facts, and is squarely attributable to the two-step procedure of petitioner's arrest. As far as the officers were concerned who

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* If such was the thinking of petitioner's co-defendants, they failed to take into account that indictments for felony-murder, as they were later charged with, would attribute the killing of Mr. Leonard to each of them. However, some practical consequence may be inferred from the fact that petitioner incurred the heaviest sentence. Of the other defendants tried in 1969, only John Wilson went through a full trial. He was found guilty and sentenced to fifteen years' imprisonment to life (1969 R1573-76, 1d-12d). After pretrial suppression hearings, Morse Fillyaw and Willie Brigham agreed to pleas of manslaughter (1969 R1019-27, 1c-19c). Fillyaw was given a six year prison sentence. Herman Fillyaw agreed to a plea of conspiracy to commit robbery, and received a sentence of three years' imprisonment (1969 R1c-19c).

took him into custody on the basis of an anonymous tip, his formal arrest—much less any arraignment—would not come until the arrest by Assistant District Attorney Allatin. Until then, petitioner was in a form of custody where the protective strictures of the Constitution set forth in *Miranda* were conveniently unclear. The police could interrogate petitioner about the Electrical Company robbery, as they did, without giving him *Miranda* warnings; and they could have him placed in not one but two line-ups, without counsel, as they did, again without giving him *Miranda* warnings.

Perhaps more significantly, the police could easily have believed they had the prime suspect of their investigation without realizing the totality of fortuitous events which brought petitioner into their custody. They had not known his name or his identity until the day of his arrest, and they may not have known it when they arrested him. The other suspects involved the police had known for some time—as those suspects knew all too well themselves. Moreover, the others knew that a murder had been committed for which the police, prior to petitioner's arrest, had no suspect other than themselves. The likelihood is thus high that petitioner had been to a large extent framed, knowingly by his co-defendants even if unwittingly by the police. Petitioner's established addiction on the day of his arrest, and his actual insanity and later commitment to Matteawan State Hospital during the time of all proceedings involving his co-defendants, only helped to compound the likelihood of error.

These factual considerations are given legal stature warranting the granting of the writ here under this Court's decisions in *Townsend* v. *Sain*, 372 U.S. 293 (1963), *Mallory* v. *United States*, 354 U.S. 449 (1957) and *McNabb* v. *United States*, 318 U.S. 332 (1943), as well as in *Miranda* v. *Arizona* itself, 384 U.S. 436 (1966). These decisions are incompatible with New York's delayed arrest procedures in homicide cases as followed in this instance.

POINT I

New York's Delayed Arrest Procedures in Homicide Cases, as Applied in This Case, Are Unconstitutional.

A federal court must grant an evidentiary hearing to a habeas applicant if "the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing" or "the material facts were not adequately developed at the state court hearing." *Townsend* v. *Sain*, 372 U.S. 293, 313.

Under this test, the District Court found, correctly, that the State court had made inadequate factual findings to support a determination that petitioner had waived his Fifth Amendement privilege and his right to counsel. Instead of conducting an evidentiary hearing to develop *all* the facts relevant to that issue, however, the District Court conducted a very limited hearing. The only testimony taken at the hearing was psychiatric testimony, and the only issue addressed was the issue of petitioner's sanity at the time he made his alleged confession.*

The District Court erred in so restricting the scope of the hearing. The voluntariness of petitioner's waiver of his Fifth Amendment privilege and his right to counsel involved far more than the issue of his sanity on January 8, 1968. It involved the full circumstances by which the police could, with relative impunity, ignore the rudiments of petitioner's Constitutional rights simply because he had not yet been formally arrested.

a. Delay in Arraignment

Despite the fact that he was apprehended at 2:30 p.m. on January 8, was identified in two line-ups that afternoon

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* At the beginning of the District Court hearing Judge Weinstein requested testimony from the two detectives who had interrogated and secured petitioner's alleged confession. For reasons which do not appear from the record, those two witnesses never appeared to testify.

and was in continuous police custody all that afternoon and evening, petitioner was not brought before a court for arraignment until the morning of January 9. This Court has mandated that no evidence taken during an unnecessary or unreasonable delay in arraignment, in violation of Rule 5(a) of the Federal Rules of Criminal Procedure, may be admitted in Federal criminal proceedings, *Mallory* v. *United States,* 354 U.S. 449 (1957); *McNabb* v. *United States,* 318 U.S. 332 (1943); *United States* v. *Middleton,* 344 F.2d 78 (2d Cir. 1965) (where the time lapse between arrest at 7 p.m. on one day and arraignment at 9 a.m. the following morning was held to be both "unnecessary" and "unreasonable").* New York CPL Section 140.20, which governed the procedures used in this case, imposes a requirement of arraignment without unnecessary delay similar to the requirement which governs in Federal cases. The New York courts have also held that an overnight delay in arraigning a suspect already in custody is unnecessary. and constitutes a "prima facie suspect circumstance". *People* v. *De Jesus,* 63 A.D.2d 148, 407 N.Y.S.2d 5 (1st Dept. 1978).

No explanation was offered by the police officers to the State court for their long delay in arraigning petitioner. The police had two line-up identifications by late afternoon, and did not need his confession as justification for regarding him as a suspect subject to further detention. *See Mallory* v. *United States,* 354 U.S. at 445. The unavailability of a magistrate during evening hours did *not* license continued interrogation of petitioner. *United States* v. *Middleton,* 344 F.2d at 82. Nor did any eventual giving of *Miranda* warnings (if they were given) relax the need for compliance with the *McNabb-Mallory* rule. *Miranda* v. *Arizona,* 384 U.S. at 463. The rationale for the rule—that unwarranted delay gives the police an opportunity to elicit damaging statements—is further invoked by the facts of this case, where

* While the *McNabb-Mallory* Rule has a statutory basis, it is also grounded in Fifth Amendment policy. *Miranda* v. *Arizona,* 384 U.S. 436, 463 (1966).

there is a visible pattern of police interrogation so as to break later suspects by use of a confession made by the first defendant arrested and questioned. *Mallory* v. *United States,* 354 U.S. at 454.

b. Absence of Counsel

Petitioner's statement was, of course, taken without counsel present. While this would not invalidate the confession *per se,* absence of counsel put a heavy burden on the State to demonstrate the voluntariness of the confession. *Miranda* v. *Arizona,* 384 U.S. at 475; *United States ex. rel. B.* v. *Shelly,* 430 F.2d 215 (2d Cir. 1970). In addition, in the only instance when we have a record of the questions asked him, petitioner refused to make any confession to Assistant District Attorney Allatin and demanded counsel at that time.

Under the circumstances of petitioner's interrogation, his failure to insist on the presence of counsel could not, as a matter of law, be construed as a voluntary waiver. The following sequence of events was uncontested and emerges very clearly from the record. In the course of being given his *Miranda* warnings—assuming that they were in fact given at 6:45 and not at 7:10, and indeed that they were given at all—the petitioner was asked whether he had an attorney. He responded that he did (6a). Rather than going on to ask any of the logical follow up questions, such as "Would you like to call your attorney?" or "Who is your attorney?", or "Would you like to have your attorney present?," the interrogating officer simply went on mechanically reading from the form listing the *Miranda* warnings. He then proceeded to take the supposed inculpatory statement from the petitioner.

This Court has recognized that the right to counsel lies at the heart of the panoply of rights accorded to criminal defendants; without the presence of counsel there will always be a serious question as to whether other

rights were intelligently and freely waived. *Miranda* v. *Arizona,* 384 U.S. 436, 469 (1966). As a corollary to this principle, the courts have held that the State bears a heavy burden to show waiver of the right to counsel. "The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." *Carnley* v. *Cochran,* 369 U.S. 506, 516 (1962). Such a waiver may not be inferred from the silence of the defendant, even after warnings are given. *Miranda* v. *Arizona,* 384 U.S. at 475-76; *United States* v. *Montos,* 421 F.2d 215 (5th Cir.), *cert. denied* 397 U.S. 1022 (1970). It is not enough to show that the defendant understood his rights; it must be shown that he affirmatively relinquished them. *Brewer* v. *Williams,* 430 U.S. 387 (1977).

Where the other circumstances surrounding the questioning are sufficiently suspicious, the courts have required the State to prove that the defendant *expressly* declined the assistance of counsel; his signature on a standard form of notice and waiver of rights is insufficient to show express declination. *Sullins* v. *United States,* 389 F.2d 985 (10th Cir. 1968). Where the defendant has actually *asked* for counsel, *Miranda* v. *Arizona,* 384 U.S. at 445, or has indicated that he has counsel, *Misner* v. *United States,* 384 F.2d 130 (5th Cir. 1967), the interrogation must cease until counsel is secured. Any incriminating statements obtained in contravention of this rule are inadmissible, *United States* v. *Massey,* 550 F.2d 300 (10th Cir. 1977); *United States* v. *Blair,* 470 F.2d 331 (5th Cir.), *cert. denied* 411 U.S. 908 (1972), even where the defendant has agreed to go forward with the questioning before calling his attorney, *United States* v. *Nielson,* 392 F.2d 849 (7th Cir. 1968). Where there is any question as to whether the defendant's response constitutes an assertion of his right to counsel, all questioning should cease until the state has determined whether or not he wants counsel present. *Cf. United States* v. *Riggs,* 537 F.2d 1219, 1222 (4th Cir. 1976) (if suspect's statement

may be construed as invocation of a right to remain silent, government agents should clear up ambiguity before proceeding with interrogation).

Under the circumstances in which the petitioner's alleged confession was supposedly taken in the instant case—including the lapse of time between arrest and arraignment, the uncertainty as to the time of the *Miranda* warnings and petitioner's psychological instability and use of drugs—nothing short of an express declination should have sufficed to base a finding of voluntariness. Far from being able to show such declination, the State conceded that petitioner had responded affirmatively to the question "Do you have an attorney?" The response would suggest that petitioner was prepared to invoke his right to counsel, as he unquestionably did shortly thereafter before Mr. Allatin. At the very least it called for a clarification by the investigators.

The District Court should have found that the petitioner's failure expressly to request the presence of counsel under the circumstances could not be considered a voluntary waiver. Since the confession was inadmissible if obtained in derrogation of constitutional rights not voluntarily waived, the error is material and the writ of habeas corpus should have issued.*

c. The Potential for Mistake

Other important circumstances surrounding the interrogation were never adequately explained and reinforce the legitimate doubts as to voluntariness raised by the foregoing facts. The records of the co-defendants' trials show

* If petitioner's confession was indeed involuntary, his conviction may not be allowed to stand even if there is other evidence sufficient to sustain the verdict. *Stroble* v. *California,* 343 U.S. 181, 190 (1952). In this case, the confession was so heavily emphasized at trial that its introduction could not possibly have constituted harmless error. The confession was read to the jury no less than five times, and was introduced not only for the purposes of proving petitioner's guilt but also for the purpose of vitiating his defense of insanity.

that with the exception of Brigham, the police did not bring in the other defendants until after petitioner had been in custody for several hours. Then the police used petitioner and his statement, after securing it, to confront his co-defendants and induce them to follow suit. At their trial, there was considerable testimony of police intimidation and threats, and even a concession by Detective Caltagirone that he said signing the *Miranda* sheets couldn't hurt. If indeed the police regarded petitioner's confession as the key to obtaining all the others', they would have had an overwhelming motive to secure his statement by whatever means. If they deceived him into believing that he had already been implicated by one of his co-defendants, then the trustworthiness of the confession must be suspect. *Cf. Spano* v. *New York,* 360 U.S. 315 (1959); *United States ex rel. Everett* v. *Murphy,* 329 F.2d 68 (2d Cir. 1964), *cert. denied* 377 U.S. 969 (1965).

In addition, the fact that appellant was under the influence of narcotics at the time of his arrest and alleged confession, and that he suffered withdrawal symptoms and had to be taken to a hospital within hours thereafter, is significant. It is well established that a person under the influence of narcotics may not be sufficiently in control of his own actions to render a "voluntary" confession. *Townsend* v. *Sain,* 372 U.S. 293 (1963); *United States ex rel. Collins* v. *Marony,* 287 F. Supp. 420 (E.D. Pa. 1968). Moreover while the State did offer psychiatric testimony both at the *Huntley* hearing and at petitioner's jury trial, the psychiatrists who testified had had no contact with petitioner until after his long incarceration in the Matteawan State Hospital—a full two and a half years after he gave the alleged confession as to which their testimony was supposed to be relevant. There was no medical testimony or evidence of any other kind about petitioner's treatment on the night of his arrest, although we know from the 1969 trial that such evidence existed. The record is also silent regarding the likely physical effects of drug addiction, *see e.g. United States ex rel.*

Collins v. *Marony, supra,* or the chemical properties of the drugs which appellant had ingested and their likely effect on his exercise of free will, *see e.g. Townsend* v. *Sain.**

Each of the circumstances described above casts serious doubts on the voluntariness of petitioner's waiver of his Fifth Amendment privilege and right to counsel—doubts which were never dispelled by the State's witnesses. Taken as a group, the circumstances establish a pattern of practices amounting to a deliberate violation of petitioner's rights which, when petitioner was tried alone over three years after his arrest, could easily be covered by a fog of silence and lack of recollection. Under such circumstances, the State must be found to have failed to sustain its burden of showing voluntariness during a period of illegal detainment and in the absence of counsel, and the State court must be found to have erred in letting the jury hear petitioner's supposed confession and nonetheless decide the voluntariness of any waiver.

This pattern of practices persists in New York in homicide cases, as shown in *People* v. *De Jesus, supra.* It is a pattern which in this case does not comport with the Constitutional standards mandated by this Court.

CONCLUSION

Most of the elements which in the past have led Federal courts to question and to carefully scrutinize the voluntariness of waivers of Constitutional rights are present here. These elements are present because New York's two-step arrest procedures in homicide cases gave petitioner's

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* The prosecution's psychiatrist did purport to analyze the confession itself, and testified that its coherence evidenced the sanity of petitioner at the time he made it. That testimony is empirically suspect, in light of the investigators' testimony that petitioner's "statement" was not a narrative but rather a series of answers to carefully structured questions. It is also legally suspect in light of this Court's rejection of the use of coherence as a test of voluntariness. *Townsend* v. *Sain,* 372 U.S. at 320.

arresting officers excessive latitude in seeking to obtain an inculpatory statement. Petitioner accordingly prays that the writ sought herein issue so that this Court may review the application of those procedures to the facts of this case.

Dated: New York, New York
March 21, 1979

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, ex rel., ERNEST FEELINGS, *Petitioner,* v. EUGENE LEFEVRE, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY, NEW YORK, *Respondent.*	MEMORANDUM AND ORDER — DENIAL OF CERTIFICATE — 76-C-1862

APPEARANCES:

EDWARD KELLY,
for petitioner

ATTORNEY GENERAL OF THE STATE OF NEW YORK by
MARK C. RUTZICK, and
ROBERT A. FORTE,
for respondent

WEINSTEIN, D. J.:

Ernest Feelings petitions this court for a writ of habeas corpus. He was convicted of a felony murder, arising out of the fatal shooting of one Nathan Leonard during the commission of a robbery. Petitioner's conviction was affirmed by the Appellate Division and leave to appeal to the New York Court of Appeals was denied.

The robbery and shooting occurred on December 1, 1968. Petitioner was arrested on January 8, 1969. Shortly thereafter he was adjudged mentally incompetent to stand trial and was confined in Matteawan State Hospital for approximately 2½ years. He was released from the hospital in

September, 1971 and was tried and convicted in March, 1972. The facts will be more fully developed below.

Petitioner challenges his conviction on the following grounds:

1. An inculpatory statement he had made on the day of his arrest was erroneously admitted into evidence against him because: (a) the police failed to advise him of his rights prior to taking his statement; and (b) he did not waive, and was incompetent to waive, his rights.

2. In-court identifications were tainted by illegal line-up identifications.

3. He was prejudiced by the prosecutor's reference in his opening statement to a line-up identification that had previously been excluded from evidence.

4. He was deprived of his due process right to a fair trial because the trial court failed to hold a competency hearing prior to the *Wade* and *Huntley* hearings.

5. He was denied his sixth amendment right to confront an adverse witness because one of the persons from whose descriptions the police prepared a composite picture of the perpetrator was not available for cross-examination at trial.

I.

Claim that an inculpatory statement made by petitioner was erroneously admitted into evidence against him because: 1) The police failed to advise petitioner of his rights prior to taking his statement; and 2) Petitioner did not waive, and was incompetent to waive, his rights.

Pursuant to *People* v. *Huntley,* 15 N.Y.2d 72, 255 N.Y.S. 2d 838, 204 N.E. 2d 179 (1965), New York's implementation of *Jackson* v. *Denno,* 378 U.S. 368 (1964), the trial court held a hearing on the question of the voluntariness of the inculpatory statement made by petitioner. At the conclusion of this hearing, the trial court found that petitioner has been advised of his rights before he made the inculpatory statement attributed to him (Tr. at 263); that he was in a normal condition and fully aware of the surrounding circumstances at the time and place he made the statement (Tr. at 262); and that, therefore, the "prosecution has established beyond a reasonable doubt that [petitioner's] statements in which he is alleged to have confessed to the participation in the commission of the crime was voluntarily made and is therefore admissable in evidence; it would be submitted as a question of fact for the jury to also pass upon the voluntariness of the statement." (Tr. at 262).

Petitioner's challenge to these findings raises a question concerning the weight to be given the trial court's conclusions and whether petitioner is now entitled to an evidentiary hearing into questions of fact that have already been resolved against him in the state court.

In *Townsend* v. *Sain,* 372 U.S. 293 (1963), the Supreme Court stated that "a federal evidentiary hearing is required unless the state-court trier of fact has after full hearing reliably found the relevant facts." *Id.* at 312-13. The Court further held that:

> a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances:

> If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair hearing.

Id. at 313.

The Court added that this list of situations, the existence of any one of which will mandate the holding of an evidentiary hearing by the habeas court, does not foreclose the possibility of hearings in other circumstances as well:

> In all other cases where the material facts are in dispute, the holding of such a hearing is in the discretion of the district judge. If he concludes that the habeas applicant was afforded a full and fair hearing by the state court resulting in reliable findings, he may, and ordinarily should, accept the facts as found in the hearing. But he need not. In every case he has the power, constrained only by his sound discretion, to receive evidence bearing upon the applicant's constitutional claim.

Id. at 318.

Townsend v. Sain's list of circumstances which mandate holding of an evidentiary hearing has been incorporated into 28 U.S.C. § 2254(d) (1970). According to this subsection, a state court's factual determinations, evidenced by written findings, are entitled to a presumption of correctness in a subsequent federal habeas proceeding unless the existence of one of the Townsend categories or some additional circumstance (state court lacked jurisdiction; state court failed to appoint counsel to represent indigent defendant; applicant otherwise denied due process) is established. If the habeas applicant fails to make such a showing or if it appears that the state court hearing was not deficient in any of these respects, the burden is on the applicant "to establish by convincing evidence that the factual determination by the State court was erroneous." 28 U.S.C. § 2254(d); *Tanner* v. *Vincent,* 541 F.2d 932, 937 (2d Cir. 1976).

As stated above, the trial court found that petitioner had been advised of his rights before the police took his inculpatory statement. These circumstances are not sufficient to mandate an evidentiary hearing or to rebut § 2254(d)'s presumption of correctness.

The following facts emerge from the record. Petitioner was arrested at approximately 2:30 P.M. on January 8, 1968. After he and two of his arresting officers, Caltagirone and Rinaldi, arrived at the police station, at approximately 3:30 P.M., the first of two lineups was conducted there. Thereafter, petitioner and officer Rinaldi travelled to the hospital where Mr. Abrams, a witness who had been seriously wounded during the robbery, was confined; a second lineup was held at Mr. Abrams' bedside. Petitioner had not yet been advised of his right to counsel and had not been represented at either of the two lineups. After the hospital lineup, petitioner and officer Rinaldi returned to the police station, arriving at approximately 6:30 P.M.

Officer Caltagirone testified that upon petitioner's return from the hospital, he asked petitioner to tell him what happened, and that petitioner replied that he wanted to "tell the truth" because his accomplices had "crossed" him. Thereupon, according to the police officer's testimony, officer Caltagirone read petitioner's rights to him from a written form and asked petitioner, after the recitation of

each right, whether he understood that right; petitioner answered "yes" each time and his responses were recorded on the warning form. As part of this procedure, officer Caltagirone read the following question to petitioner: "You have the right to have an attorney present with you during any questioning now or in the future. *Do you have an attorney?*" (Tr. at 93) (emphasis supplied). Petitioner answered "yes," and this response was recorded on the warning form. Because of this answer, Caltagirone believed that petitioner had an attorney (Tr. at 109), yet he did not ask petitioner who his attorney was or whether he wanted his attorney present during questioning (Tr. at 108). In response to a question from the court, officer Caltagirone stated that he had advised petitioner of his right to telephone his attorney; however, there was no notation on the warning form indicating that the officer had in fact informed petitioner of this right. (Tr. at 108).

Officer Caltagirone further testified that he again asked petitioner: "Why are you giving me this statement?" Petitioner answered: "I want to tell the truth because they crossed me." (Tr. at 95). Both the officer and petitioner then signed the form (petitioner claims that the signature was not his, but a handwriting expert testified that it was) and the officer heard and recorded petitioner's statement in a book. In that statement, petitioner admitted taking part in the robbery and shooting Mr. Leonard and Mr. Abrams, but claimed that the shootings were accidental.

Several hours later, an Assistant District Attorney was called to question petitioner further. Petitioner was again informed of his rights, but this time refused to speak without an attorney present (Tr. at 221). Later that same night petitioner began to exhibit narcotics withdrawal symptoms.

What also emerged from the record was the fact that the form from which petitioner's rights were read to him bore the notation "7:10 P.M." as the time when petitioner was given the *Miranda* warning. Yet the book in which

petitioner's statement was recorded bore the notation "6:4 P.M." as the time when the statement was taken. Officer Caltagirone conceded that "6:4" denoted a time somewhere between 6:40 and 6:49 P.M., but insisted that petitioner was advised of his rights before the statement was taken and that he had made an error in noting the time. Officer Rinaldi, who was also present at the time, also testified that petitioner's statement was taken after he had been informed of his rights. The trial judge, who took part in examining these witnesses and who had an advantage that we lack—the opportunity to observe their demeanor, *see Wright* v. *North Carolina,* 438 F.2d 405, 408 (4th Cir. 1973)—obviously chose to credit their testimony.

The record demonstrates that this factual matter has already been fully probed and developed on the state level. Petitioner nevertheless seems to assert that the state court's determination was not fairly supported by the record. If the standard for "fairly supported" is the same as the "clearly erroneous" standard that is applied in appellate review, *Wright* v. *North Carolina,* 483 F.2d 405 (4th Cir. 1973); *see also United States ex rel. Bornholdt* v. *Termullo,* 402 F. Supp. 374, 377 (S.D.N.Y. 1975), then this court cannot say that the state court's finding, that the warning preceded the confession, was not fairly supported by the record. This factual dispute was resolved on the basis of the trial court's perception of the credibility of the various witnesses. Therefore, since there was evidence to support this finding and "[s]ince the credibility of [the] testimony and the weight to be extended to it were matters to be determined by the trial judge, who observed the witnesses [it cannot be said] that the court's findings were clearly erroneous . . . ," even if some other court might have reached another result. *United States ex rel. Fitzgerald* v. *LaValle,* 461 F.2d 601, 604 (2d Cir. 1972).

The fact that there was a discrepancy between the times noted by Officer Caltagirone on the various writings is not

determinative. A similar discrepancy was urged as a ground for relief in *Bailey* v. *United States,* 410 F.2d 1209 (10th Cir. 1969). In that case, a waiver form indicated that it had been signed after the defendant confessed. An FBI agent's notes showed that his interview with the defendant began at 3:49 P.M. and concluded at 4:36 P.M.; yet the waiver form bore the notations 5:02 P.M. and 5:13 P.M. "The agent who inserted the time on the form explained the discrepancies as a mistake." *Id.* at 1213 n.4. "[The defendant] testified that this waiver was not read to him nor signed until after he had made the statement. Two FBI agents testified that prior to interrogation [the defendant] was fully advised of his right to counsel and to the other rights contained in the written waiver and that the written waiver itself was signed prior to interrogation. The conflict in this evidence was one to be resolved in the trial court. . . . The error as to the time of the waiver as shown on the form itself was not fatal." *Id.* at 1213-14.

The purely factual finding that petitioner was informed of his rights is accepted. There are, as noted below, some doubts as to the trial court's findings that petitioner was competent and that his statement was made voluntarily. These issues were considered de novo by this court.

A state court's findings are not decisive if the trial judge had applied incorrect constitutional standards in disposing of the petitioner's claim, *see Townsend* v. *Sain,* 372 U.S. at 314; for, if incorrect constitutional standards had been applied, the trial judge could not have focused his attention on or have made findings based upon all of the relevant facts. *See United States ex rel. Lewis* v. *Henderson,* 520 F.2d 896 (2d Cir. 1975); *United States ex rel. William* v. *LaVallee,* 487 F.2d 1006 (2d Cir. 1973). Therefore, although "under 28 U.S.C. § 2254(d) and the Supreme Court's decision in *LaVallee* v. *Delle Rose* . . . the habeas court must accord . . . prior state findings great weight . . . , it is equally true that the habeas court must itself insure

that the relevant facts were found and that the correct legal standards were applied to them." *United States ex rel. Williams* v. *LaVallee, supra,* 487 F.2d at 1010. "It is only where 'it can scarcely be doubted' that the relevant factual issues have been resolved against the petitioner and that 'there is no evidence that the state trier utilized the wrong [legal] standard,' that § 2254 requires the habeas court to dismiss a subsequent petition without an independent evidentiary hearing." *Id.* at 1011, quoting *LaVallee* v. *Delle Rose,* 410 U.S. 690 (1973). (In the usual case, however, the habeas court may assume that the trial court applied the correct constitutional standards to the facts. *Townsend* v. *Sain,* 372 U.S. at 293.)

Even if the state court findings are entitled to a presumption of correctness, such deference to its determinations of fact does not extend to its findings of law. As stated in *Townsend* v. *Sain:*

> Although the district judge may, where the state court has reliably found the relevant facts, defer to the state court's findings of fact, he may not defer to its findings of law. It is the district judge's duty to apply the applicable federal law to the state court fact findings independently. The state conclusions of law may not be given binding weight on habeas.

Id. at 318.

A state court's finding that a defendant's confession was voluntary is not entitled to the same respect as a factual finding—it is a mixed question of law and fact that does not foreclose the habeas court's independent review. *United States ex rel. Hayward* v. *Johnson,* 508 F.2d 322, 325 (3d Cir. 1975); *Mancusi* v. *United States ex rel. Clayton,* 454 F.2d 454, 456 (2d Cir. 1972).

Petitioner challenges the state court's findings of voluntariness on two additional grounds: 1) that he had not

waived his *Miranda* rights, and 2) that he was incompetent to waive these rights. The trial court did not adequately focus on either of these aspects of voluntariness.

The state court's conclusions of fact and of law are devoid of any finding that petitioner had waived his right against self-incrimination or his right to counsel during interrogation. *Compare, Tanner* v. *Vincent,* 541 F.2d 932, 934 n.2 (2d Cir. 1976). The trial court's findings make no mention of the fact that petitioner had indicated that he had an attorney, *compare Misner* v. *United States,* 384 F.2d 130 (5th Cir. 1967), or of the heavy burden of proof that *Miranda* v. *Arizona,* 384 U.S. 436, 475 (1966) places on the prosecution to establish waiver when an unrepresented suspect confesses. Instead, the trial court focused on the mere fact that petitioner had been given a *Miranda* warning—excluding all statements made before the warnings were given (Tr. at 257) and admitting into evidence all statements made thereafter. Yet, the Supreme Court's decision in *Miranda* v. *Arizona* established the need for not only a warning but also for a knowing and intelligent waiver of known rights. *See, United States* v. *Harrison,* 451 F.2d 1013 (2d Cir. 1971) ("The only way this essential right to counsel can be waived is by giving specific instructions to the accused informing him of his rights and then by having the accused make an intelligent waiver of such rights."). The state court's finding are deficient in this respect.

The trial court should have made the following findings: "that (1) the *Miranda* warnings were given; (2) the defendant knowingly and intelligently waived his privilege against self-incrimination . . .; (3) the defendant voluntarily, knowingly and intelligently waived his right to have retained or appointed counsel present at the interrogation; (4) the confession or statement was freely and voluntarily made." *Evans* v. *United States,* 375 F.2d 355, 360 (8th Cir. 1967). The trial court made findings only with respect to the first and last of these elements.

The defect in the trial court's findings is analagous to that in *United States ex rel. B.* v. *Shelly,* 305 F. Supp. 55 (E.D.N.Y. 1969), *aff'd,* 430 F.2d 215 (2d Cir. 1970):

> In passing upon petitioner's contention, the New York courts determined that his confessions given after appropriate warnings were "voluntary" even though those statements made before full *Miranda* warnings were given were suppressed . . . . But in considering the "voluntariness" of the confessions the state courts failed to give adequate weight to a fundamental aspect of the *Miranda* equation.
>
> Not only must a confession be voluntary, but the waiver of the rights protected by *Miranda* must be voluntary. It must, for example, be found that the defendant knowingly and willingly waived his rights to silence and counsel. The question left unanswered by the New York court is whether, under the circumstances of this case, the petitioner knowingly and willingly waived his rights to silence and counsel under *Miranda.* Since the state courts have not passed upon this issue, this Court must independently apply the appropriate federal law.

305 F. Supp. at 58.

The fact that the trial court did not expressly find that petitioner had knowingly waived his rights may not be determinative if such a finding can be inferred from the conclusions that were made (*see, United States* v. *Johnson,* 474 F.2d 6 (9th Cir. 1973)) or from the record.

A finding of waiver cannot necessarily be inferred from the trial court's conclusion that petitioner's confession was voluntary because, although waiver and voluntariness are related concepts, they present distinct issues to be determined according to different standards. *See, Williams* v. *Brewer,* 375 F. Supp. 170, 183 n.7 (S.D. Iowa 1974), *aff'd,* 509 F.2d 227 (8th Cir. 1975) ("[T]he issue with regard

to 'waiver' is whether the accused understood his rights and intelligently and voluntarily waived them, while the issue with regard to 'voluntariness' is whether the accused's actions were the product of the free exercise of his will.''). Nor can a finding of waiver be inferred from the record. It is true that defendant did make an inculpatory statement and that he eventually did invoke his right to remain silent; but neither factor is dispositive. *See, Williams* v. *Brewer,* 509 F.2d 227, 233 (8th Cir. 1975); *United States ex rel. Williams* v. *Twomey,* 467 F.2d 1248, 1251 (7th Cir. 1972). As stated in *Miranda* v. *Arizona,* 384 U.S. at 475-76:

> If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. . . .
>
> An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained. . . .
>
> . . . Moreover, where in-custody interrogation is involved, there is no room for the contention that the privilege is waived if the individual answers some questions or gives some information on his own prior to invoking his right to remain silent when interrogated.

Another issue that seems to have been left unresolved was petitioner's competence to waive his constitutional rights. The trial court did hear evidence on the question of petitioner's mental condition at the time the inculpatory statement was made; both the police officers and petitioner

testified, and defense counsel was permitted to read excerpts from psychiatric reports into the record. At the conclusion of the hearing, the trial court credited the police officers' testimony that petitioner appeared normal and aware and discredited petitioner's contrary testimony, including his assertion that he had been under the influence of drugs at the time. (The trial court's findings, however, made no mention of the psychiatric report. It seems, from the record, that the trial court totally discounted its probative value.) Although the trial court did make certain findings as to the level of petitioner's understanding, it appears that these findings did not relate to the issue of knowing and intelligent waiver, but rather to petitioner's competency (i.e., his memory and ability to make an accurate statement about his acts, *see, Eisen* v. *Picard,* 452 F.2d 860 (1st Cir. 1971)) and to his understanding of the questions he was asked and the answers that he gave. Of course, a suspect's ability to understand questions asked of him and to make understandable response weighs against an assertion that he was incapable of waiving his rights. *See, United States* v. *Glasgow,* 451 F.2d 557, 558 (9th Cir. 1971). Yet, this factor is not controlling, because not only must petitioner have been capable of understanding what was said to him, but he must have had the capacity to understand the significance of a waiver. *See, United States v. Cox,* 509 F.2d 390, 392 (D.C. Cir. 1974); *United States ex. rel. B.* v. *Shelly,* 305 F. Supp. 55, 58 (E.D.N.Y. 1969), *aff'd,* 430 F. 2d 215 (2d Cir. 1970) (''A voluntary relinquishment of a constitutional right requires some understanding of what is being relinquished and of the consequences of waiver.'') Therefore, since the trial court's findings did not focus on this issue, its finding of competence is not entitled to a presumption of correctness.

This Court held a full hearing to determine whether, at the time he gave a statement to the police, on the afternoon of January 8, 1968, (A) the petitioner was competent to, and did, voluntarily, knowingly and intelligently waive his

right to have retained or appointed counsel present at the interrogation and (B) whether he was competent to, and did, voluntarily, knowingly and intelligently waive his privilege against self-incrimination. In addition to the records of proceedings in the state, the court heard Dr. Raymond Chaitin, a psychiatrist, the petitioner, and the petitioner's brothers. The court credits the testimony of the psychiatrist and finds that propositions (A) and (B) above have been established beyond a reasonable doubt.

II.

Claim that in-court identifications were tainted by illegal lineup identifications.

Within several hours of petitioner's arrest on January 8, 1968, two lineups were conducted. The first of these was at the police station where petitioner had been taken following his arrest. Mr. Anderson, one of the two witnesses to the crime, looked through a peephole at a lineup of six black men and identified petitioner and one of his accomplices. The second lineup was conducted at the hospital where Mr. Abrams, the witness who had been shot during the robbery, was confined. After six black men were led to his bedside, Mr. Abrams identified petitioner and one of his accomplices from the lineup. There was no attorney present at either lineup.

Prior to petitioner's trial, a hearing was held on the question of what identification evidence would be admitted into evidence at trial. Defense counsel moved to have the lineup identifications excluded on the grounds that there was no attorney present and that, since petitioner was the only person wearing a light jacket at the stationhouse lineup, there was a possibility of suggestion (Tr. at 59). The trial court initially refused to exclude any identification evidence from trial. After hearing detailed testimony by Mr. Abrams and Mr. Anderson about the circumstances under which they had initially observed petitioner during

the robbery and the conditions under which they had identified petitioner at the lineups, the trial court, in its findings of fact, accepted the witness' version of the events, (Tr. at 59-62) making the following conclusions of law:

> I find that the prosecution has established by clear and convincing evidence that the identification of this defendant was in no way tainted and not in violation of the defendant's rights, statutory or constitutional; that it was not as a result of suggestion by an officer and/or policeman and/or other person; that these identifications based upon their observations made at the time and place of the occurrence and of the defendant whom they identified from this witness stand, and therefore, I hold that the in-court identifications are admissible. . . .

Tr. at 62-63.

The following day, the trial judge amended his findings with respect to the lineup identifications:

> Upon review of the testimony and further research into the law . . . I hold that I am not going to admit evidence of the lineup from which it is claimed the defendant was identified. I am not going to admit it. But I am still holding that by clear and convincing evidence the prosecution has established that the in-court identification of the defendant is in no wise affected or tainted, induced, or suggested by the prosecution at the line-up where there was no attorney present.

Tr. at 144-45.

There are two constitutional grounds for excluding identification evidence: the fourth amendment's guarantee of due process and the sixth amendment right to counsel.

Even if the right to counsel had not yet attached, it would have been a denial of due process to have subjected

petitioner to "a lineup that is unnecessarily suggestive and conducive to irreparable mistaken identification." *Kirby* v. *Illinois,* 406 U.S. 682, 691 (1972). *See also, Simmons* v. *United States,* 390 U.S. 377, 384 (1968); *Stoval* v. *Denno,* 388 U.S. 293, 302 (1967). From the record, it does not appear that the lineups can be so characterized. The only possibly suggestive element in the post-arrest identifications of petitioner is that petitioner wore a light jacket during the police station lineup. In *Wade,* the Supreme Court gave examples of lineups it considered suggestive, and included among them those in which the accused is forced to wear distinctive clothing which the perpetrator allegedly wore. *United States* v. *Wade,* 388 U.S. 218 (1967). *See also, Foster* v. *California,* 394 U.S. 440, 441 (1969) (petitioner wore leather jacket during lineup, similar to the one the witness had seen on the robber); *United States ex rel. Cannon* v. *Montanye,* 486 F.2d 263, 267 (2d Cir. 1973) (petitioner wore green shirt during lineup, like the one the witness' assailant had worn). Here, the color of the jacket had no significance because the perpetrator of the crime for which petitioner was convicted was described as having worn a dark jacket. Further, it does not seem that the jacket was so striking in appearance as to draw the witness' attention to petitioner. *Compare, United States ex rel. Anderson* v. *Mancusi,* 413 F.2d 1012, 1014 (2d Cir. 1969) (lineup not unduly suggestive even though the petitioner had worn a striking red shirt). Therefore, a finding of impermissible suggestiveness is not warranted by the facts.

A second ground for excluding such evidence is a violation of the accused's right to counsel. This appears to have been the ground relied upon by the trial court, even though the lineups here in question were conducted after petitioner's arrest but before his arraignment, and, under *Kirby* v. *Illinois,* 406 U.S. 682, 688 (1972), "a person's right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him." At the time of petitioner's *Wade* hearing, *Kirby* had not yet

been decided and the trial court may have believed that *Wade,* which was concerned only with the right to counsel at post-indictment lineups, was applicable to petitioner's pre-indictment lineups. This inference is bolstered by the trial court's use of the "clear and convincing" burden of proof which *Wade* has imposed on the government to establish that an in-court identification is not tainted by a lineup conducted in violation of an accused's right to counsel.

When a lineup identification is excluded from evidence because the defendant had been denied his right to counsel, there is no "per se rule of exclusion" with respect to in-court identifications of the accused by witnesses who had previously identified him at that lineup. Rather, if the prosecution can "establish by clear and convincing evidence that the in-court identifications [are] based upon observations of the suspect other than the lineup identification," *United States* v. *Wade,* 388 U.S. 218, 240 (1967), i.e., "that the in-court identification had an independent origin and was not tainted by the prior illegal procedures," *United States ex rel. Robinson* v. *Vincent,* 371 F. Supp. 409 (S.D.N.Y. 1974), *aff'd,* 506 F.2d 923 (2d Cir. 1975), then courtroom identifications of the accused are permitted. In determining whether an in-court identification has as its origin a source independent of the lineup, the trial court must consider a number of factors:

> for example, the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification. *United States* v. *Wade,* 388 U.S. at 241.

An additional element is " 'the degree of suggestion inherent in the manner in which the prosecution presents

the suspect to witnesses for pretrial identification.' *United States* v. *Wade, supra,* 388 U.S. at 228 . . . . Hence the nature of the police station confrontation must be considered in reaching a conclusion as to independence of recollection of a witness subject to it." *United States ex rel. Robinson* v. *Vincent,* 371 F. Supp. at 416.

It seems, from the record, that all of the relevant factors were fully probed and developed during the *Wade* hearing. Both Mr. Anderson and Mr. Abrams testified in minute detail as to what they observed on December 1, 1968, the day of the shooting. Mr. Abrams testified that he saw petitioner and two other men enter his well lighted office and that he saw petitioner's face as petitioner passed by him to enter the office of Mr. Leonard. Mr. Abrams further testified that he entered Mr. Leonard's office after hearing a shot and hearing Mr. Leonard cry out. In that office, he saw petitioner with a gun and Mr. Leonard lying on the floor bleeding. Mr. Abrams stated that he attempted to kick petitioner and that petitioner then shot him, first in the knee and then in the back. Mr. Anderson testified that he also saw three men enter the office that he occupied with Mr. Abrams. He stated that he saw petitioner go to the door of Mr. Leonard's office and that he saw petitioner pull a gun. He then heard petitioner and Mr. Leonard exchange words, saw petitioner shoot Mr. Leonard, and saw Mr. Abrams run into Mr. Leonard's office. Both Anderson and Abrams were cross-examined not only as to these details but also with respect to their opportunity to observe and their descriptions of the gunman which they gave to the police after the robbery.

The details of the lineups, at which both Anderson and Abrams identified petitioner as the gunman, were also explored. Mr. Abrams testified to a six-man lineup at his hospital bedside. He stated that before the lineup he was told that a number of people would be brought in, that he was to look at them, and that he was to tell the detective

whether he recognized anyone. Mr. Abrams stated that the detective did not tell him who would be in the group exhibited to him. Mr. Anderson testified to a six-man lineup at the police station. He answered negatively when asked whether he was ever told or whether it was ever suggested that petitioner would be in the lineup, and added that he picked out petitioner because he saw him shoot Mr. Leonard.

Petitioner's challenge to the trial court's findings, made after all these facts were developed, again raises a question concerning the weight to be given a state's court's findings. The principles discussed in the previous section are applicable here.

None of the defects which, under *Townsend* v. *Sain,* 372 U.S. 293 (1963), mandate an evidentiary hearing seem to exist with respect to the issue of taint. All of the factors that, under *United States* v. *Wade, supra,* should have been considered have already been fully developed. There is no indication that the trial court failed to take the relevant facts into account. Additionally, and in contrast to its findings on the question of voluntariness, "not only is there no evidence that the state trier utilized the wrong standard, but there is every indication that he applied the correct standards." *LaValle* v. *Delle Rose,* 410 U.S. 690, 695 (1973). The trial court's findings show that it recognized that the burden on the prosecution was to establish by clear and convincing evidence that the in-court identifications were not tainted by the illegal lineups; this is the burden of proof imposed by *Wade.* To cull from *United States ex rel. Williams* v. *LaVallee,* 487 F.2d 1006 (2d Cir. 1973): "where 'it can scarcely be doubted' that the relevant factual issues have been resolved against the petitioner and . . . 'there is no evidence that the state trier utilized the wrong [legal] standard,' . . . § 2254 requires the habeas court to dismiss a subsequent petition without an independent evidentiary hearing." *Id.* at 1011, *quoting LaVallee* v. *Delle Rose, supra.*

III.

Claim that petitioner was prejudiced by the prosecutor's reference in his opening statement to a lineup identification that had previously been excluded from evidence.

During his opening statement, the prosecutor told the jury that it would hear Mr. Abrams, the witness who had identified petitioner at the hospital lineup, relate how he had identified petitioner and one of his accomplices at that lineup. Defense counsel did not object to this remark. The trial court had cautioned the jury at the outset that an opening statement is not evidence (Trial Tr. at 4). When the prosecutor finished his opening statement, the court stated: "I will strike from the opening of the district attorney the fact that the witness who identifies this defendant identified another person" (Trial Tr. at 19). This statement may have hurt more than it helped petitioner because it was directed only to that part of the prosecutor's remark which referred to the identification of petitioner's accomplice; yet, here again, no objection was made. After defense counsel finished her opening, the court again cautioned the jury not to consider an opening statement as evidence and added that, since the opening statements may have referred to matters that would not be permitted into evidence the jury should rely only on evidence from the witness stand (Trial Tr. at 24-25).

Respondent argues that defense counsel's failure to object to the prosecutor's opening statement amounted to a waiver of that objection and foreclosure of habeas review. *See, e.g., United States ex rel. Satz* v. *Mancusi,* 414 F.2d 90 (2d Cir. 1969). This argument is based on the correct premise that New York law requires a contemporaneous objection to have been made to the allegedly improper remark to preserve the issue for appellate review. CPL 470.05(2); *see, e.g., People* v. *DeTore,* 34 N.Y.2d 199, 313 N.E.2d 61, 356 N.Y.S.2d 598 (1974); *People* v. *Kuss,* 32 N.Y.2d 436, 299 N.E.2d 249, 345 N.Y.S.2d 1002 (1973). How-

ever, this is only the general rule, subject to an exception: had the prosecutor's remark deprived petitioner of a fair trial or of a fundamental constitutional right, it would have been available as an issue on appeal and could have led to reversal of petitioner's conviction, notwithstanding the lack of objection. CPL 470.15(3), (6)(a); *see, e.g., People* v. *Arthur,* 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S. 2d 663 (1968); *People* v. *McLucas,* 15 N.Y.2d 167, 204 N.E.2d 846, 256 N.Y.S.2d 799 (1965); *People* v. *Smith,* 246 N.Y.2d 156, 20 A.D.2d 579 (2d Dept. 1969); cf., *People* v. *Rahming,* 26 N.Y.2d 411, 259 N.E.2d 727, 311 N.Y.S.2d 292 (1970) (pre-trial motion to suppress all evidence of lineup identifications preserves objection for appellate review, notwithstanding lack of objection at trial). Under these circumstances, therefore, "petitioner was not precluded from asserting his constitutional claim on federal habeas by his failure to make contemporaneous objections at trial." *Malley* v. *Mason,* 547 F.2d 25, 28 (2d Cir. 1976).

On the merits, although "[i]t may be that some remarks included in an opening or closing statement could be so prejudicial that a finding of error, or even constitutional error, would be unavoidable," *Frazier* v. *Cupp,* 394 U.S. 731, 736 (1969), there are a number of factors militating against such a finding here: the challenged remark was short and certainly not vital, considering the other evidence in the case; it was made during an opening statement and was not repeated at trial; the trial court had cautioned the jury that an opening statement is not evidence. *Compare Frazier* v. *Cupp,* 394 U.S. at 733-37. In *Frazier,* the Supreme Court ruled that such an instruction was sufficient to protect the petitioner's rights in that case, adding that "[a] more specific limiting instruction might have been desirable, *but none was requested.*" *Id.* at 736 (emphasis supplied). Another factor is defense counsel's failure to object. Although this element does not foreclose habeas review, "[t]he absence of contemporaneous objections or requests for cautionary instructions are factors to be taken into

consideration" in determining whether petitioner was denied a fair trial. *Malley* v. *Connecticut*, 547 F.2d 25, 28 (2d Cir. 1976). For these reasons this claim has no merit.

IV.

Claim that petitioner was deprived of his due process right to a fair trial because the trial court failed to hold a competency hearing prior to the *Wade* and *Huntley* hearings.

In *Pate* v. *Robinson*, 383 U.S. 375 (1966), the Supreme Court stated that "the conviction of an accused person while he is legally incompetent violates due process." *Id.* at 378. Although the Court did not hold that due process requires that a competency hearing be held at any specific stage of a criminal proceeding, it did state that "state procedures must be adequate to protect this right." *Id.* Illinois' procedure for determining an accused's capacity to stand trial, which provided for a competency hearing whenever the evidence raised a "bona fide doubt" as to an accused's competency, was characterized by the *Pate* Court as a procedure that "jealously guards" an accused's right not to be tried while incompetent. *Id.* at 385.

The Supreme Court reaffirmed and elaborated upon this aspect of due process in *Dorpe* v. *Missouri*, 420 U.S. 162 (1975). Incorporating the test of incompetency enunciated in *Dusky* v. *United States*, 362 U.S. 402 (1960), the Court stated that "a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." 420 U.S. at 171. Missouri's procedure for determining an accused's competency was analagous to the Illinois procedure discussed in *Pate*. It provided for a competency hearing whenever the trial judge had "reasonable cause" to believe that an accused was incompetent to stand trial. The court characterized this practice as "constitutionally

adequate" on its face. *Id.* at 173. The particular proceeding in question, however, was held to have been inconsistent with the defendant's right to a fair trial because the evidence created a doubt about his competency sufficient to necessitate further inquiry into the matter. *Id.* at 180.

In neither *Pate* nor *Dorpe* did the Supreme Court hold that due process requires that a competency hearing must always be held prior to trial regardless of the evidence. *See, United States ex rel. Roth* v. *Zelker*, 455 F.2d 1105 (2d Cir. 1972); *United States ex rel. Evans* v. *LaVallee*, 446 F.2d 782 (2d Cir. 1971), *cert. denied*, 404 U.S. 1020 (1972). Instead, the Court found that a scheme is constitutionally adequate if it provides for an inquiry into an accused's capacity to stand trial only at such time as there is reasonable cause to believe that the accused is in fact incompetent. In both *Pate* and *Dorpe* the ultimate disposition turned on the fact that although there was ample evidence to suggest that the particular defendants were incompetent, the trial courts failed to conduct hearings to determine the defendants' mental capacity to stand trial. In other words, the defect lay not in the statutory schemes but in the particular proceedings which failed to implement them.

New York law comports with the procedures that the Supreme Court found constitutionally adequate in *Pate* and *Dorpe*. In New York, "a defendant is not entitled, as a matter of right, to have the question of his capacity to stand trial passed upon before the commencement of the trial, if the court is satisfied from the available information that there is no proper basis for questioning the defendant's sanity." *People* v. *Armlin*, 37 N.Y.2d 167, 171, 371 N.Y.S.2d 691, 695 (1975). However, "[i]f at any time before final judgment in a criminal action it [appears] to the court that there is reasonable ground for believing that a defendant is in such a state of idiocy, imbecility or insanity that he is incapable of understanding the charge, indictment or pro-

ceedings or of making his defense, it is the duty of [a New York] court to direct him to be examined in these respects." *People* v. *Smyth,* 3 N.Y.2d 184, 187, 143 N.E.2d 922, 1924, 164 N.Y.S.2d 737, 739 (1957), *quoted with approval in People* v. *Armlin, supra.* As in *Pate* and *Dorpe,* then, the decisive issue seems to be whether this procedure was properly implemented in the criminal proceedings to which petitioner was a party. Stated differently, the question is whether, prior to the *Wade* and *Huntley* hearings, there was reasonable cause to believe that petitioner was incompetent and, if there was, whether petitioner was deprived of his constitutional rights because a competency hearing was not held at that time.

Whether an inquiry into a defendant's mental capacity to stand trial is required depends upon a number of factors: "evidence of [his] irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial." *Dorpe* v. *Missouri,* 420 U.S. at 180. Prior to the *Wade* and *Huntley* hearings, which were held on December 1-2, 1971, the only evidence before the trial court, bearing upon the question of petitioner's competency, was his 2½ year confinement in, and recent release from, Matteawan State Hospital and a psychiatric report which concluded that petitioner was capable of standing trial. Because of this medical opinion, the trial court proceeded with the *Wade* and *Huntley* hearings without directing that petitioner be further examined. Shortly thereafter, however, the trial judge learned that the psychiatric report he had relied upon had not been prepared as recently as he had believed. So on December 6, 1971, notwithstanding this favorable report, petitioner's rational behavior during the hearings, and defense counsel's objections (although "[c]ounsel's opinion as to competency . . . is entitled to probative value," *United States ex rel. Curtis* v. *Zelker,* 466 F.2d 1092, 1095 n.8 (2d Cir. 1972)), the trial judge ordered that the jury be excused, that petitioner be sent to Kings

County Hospital for a psychiatric examination, and that a hearing as to petitioner's capacity to stand trial be held. Pursuant to this order, petitioner was so examined and a competency hearing was held on February 8, 1972. At that hearing, psychiatric reports concluding that petitioner was competent to stand trial were confirmed on defense counsel's motion and the trial court ordered that the proceedings be resumed.

As stated above, because of the favorable report concerning petitioner's capacity to stand trial, which was submitted to the trial court prior to the *Wade* and *Huntley* hearings, the trial judge proceeded with those hearings without directing that petitioner be examined again. Even assuming that, notwithstanding this favorable report, there was reasonable cause to believe that petitioner was incompetent prior to the hearings, petitioner was not prejudiced by the fact that no inquiry as to his capacity was initiated at that time but was deferred until after the *Wade* and *Huntley* hearings were completed. The Supreme Court has never held that there can be no constitutionally adequate substitute for holding a competency hearing immediately upon learning that reasonable grounds for a hearing exist. To the contrary, the Supreme Court has suggested, in dictum, that even if the facts mandate a competency hearing, it may be permissible to defer such a hearing until the trial is completed. "Such a procedure may have advantages, at least where the defendant is present at the trial and the appropriate inquiry is implemented with dispatch." *Dorpe* v. *Missouri,* 420 U.S. at 182. *See also, Jackson* v. *Indiana,* 406 U.S. 715, 740-41 (1972).

In *United States* v. *Bernstein,* 417 F.2d 641 (2d Cir. (1969), the Court of Appeals for the Second Circuit was faced with an argument analagous to that raised by petitioner. There, the defendants urged that they had been denied due process because the trial court failed to make a timely determination of their physical capacity to stand

trial. The Court of Appeals said that "[a]lthough he might have been better advised to hold a pre-trial hearing concerning the defendants' ability to stand trial, [the trial judge] did not abuse his discretion in refusing to do so," *Id.* at 643, because he acted in reliance upon a physician's oral report that the defendants were able to stand trial. The Court of Appeals went on to say that even if the lower court's failure to conduct a pre-trial hearing was an abuse of discretion, this error was corrected when the trial judge did in fact grant a hearing at the close of the prosecution's case.

By analogy, even if the trial judge abused his discretion by failing to order a competency hearing prior to petitioner's *Wade* and *Huntley* hearings, this error was corrected when the court ordered that petitioner be reexamined and that a competency hearing be held prior to the trial itself.

In this case, the testimony of Dr. Chaitin in this court showed beyond a reasonable doubt that defendant was fully competent at the time of the *Wade* and *Huntley* hearings. Any possible ambiguity of the state record on this score was resolved in respondent's favor by the federal habeas hearing.

V.

Claim that petitioner was denied his sixth amendment right to confront an adverse witness because one of the persons from whose descriptions the police prepared a composite picture of the perpetrator was not available for cross-examination at trial.

This claim is reminiscent of that raised in *United States ex rel. Meadows* v. *New York,* 426 F.2d 1176 (2d Cir. 1970), *cert. denied,* 401 U.S. 941 (1971), where the petitioner argued that he had been denied the right to confront two witnesses who had appeared before the grand jury which had indicted him but who had not appeared as witnesses at his trial. This contention was rejected because "the sixth

amendment applies to evidence actually disclosed at trial" and "a defendant has no right to confront a 'witness' who provides no evidence at trial." *Id.* at 1184. This language is applicable to the claim urged by petitioner. Mr. Al Rony, who was one of the persons who had described the perpetrator to a police artist, did not appear as a witness at trial and the composite drawing prepared, in part, from his description was not displayed to the jury. Since Mr. Rony provided no evidence at trial, petitioner's claim that he was prevented from cross-examining this "witness" is without merit.

The state record as well as the hearing held in this court demonstrates that no constitutional right of petitioner has been violated. Accordingly, the petition must be dismissed. For the reasons stated above a Certificate of Probable Cause for Appeal is denied.

The Clerk shall send a copy of this memorandum and order to petitioner and to counsel.

So Ordered.

Dated: Brooklyn, New York
March 22, 1978

/s/ Jack B. Weinstein
U. S. D. J.

Supreme Court, U. S.
FILED
APR 18 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1459

UNITED STATES OF AMERICA, ex rel. ERNEST FEELINGS,
Petitioner,

v.

EUGENE LEFEVRE, Superintendent, Clinton Correctional Facility, New York,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

UNITED STATES OF AMERICA, ex rel. ERNEST FEELINGS,

Petitioner,

v.

EUGENE LEFEVRE, Superintendent, Clinton Correctional Facility, New York,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

A copy of the opinion of the District Court for the Eastern District of New York (*Weinstein*, J.), dismissing petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 has been annexed to the petition. The decision has not been reported to date.

The Court of Appeals for the Second Circuit (Feinberg, Mulligan and Gurfein, C. JJ.), affirmed the judgment of the

District Court without opinion. The judgment of affirmance was entered on December 21, 1978. An order denying, without opinion, petitioner's motion for reargument was entered on February 22, 1979.

At the state court level, the judgment of conviction was entered on September 15, 1972, following trial by jury before the Honorable Hyman Barshay in the Supreme Court of the State of New York, County of Kings. There is no reported opinion.

The Appellate Division of the Supreme Court, Second Department, affirmed the judgment of conviction, without opinion, by order entered March 19, 1975.* Petitioner's application for leave to appeal to the Court of Appeals of the State of New York was denied on July 21, 1975.

Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

Question Presented

Should a writ of certiorari issue where the sole question is whether, on the facts of this case, petitioner voluntarily, knowingly and intelligently waived his privilege against self-incrimination and his right to counsel, those facts having been fully explored in hearings below? ....

Statement of the Case

The sole, albeit disguised, objective of the within petition is to have this Court conduct yet another review of the factual finding that petitioner voluntarily, knowingly

* That order also affirmed an order denying petitioner's post-conviction *coram nobis* application to vacate his sentence.

and intelligently waived his privilege against self-incrimination and his right to have retained or appointed counsel.

Petitioner had a pretrial hearing pursuant to *People* v. *Huntley,* 15 N Y 2d 72, 204 N.E. 2d 179 (1965). At the conclusion of that hearing, the state court made extensive findings of fact and conclusions of law that petitioner was properly advised of his rights before he confessed, that he voluntarily waived his right to counsel and his privilege against self-incrimination and that he voluntarily confessed. The jury made its own evaluation of these factual issues and reached the same conclusion. The Appellate Division unanimously affirmed and the Court of Appeals denied leave to appeal.

At the District Court level, on the habeas corpus petition, petitioner bore the burden of demonstrating by convincing evidence that the state court findings were erroneous. *LaVallee* v. *Delle Rose,* 410 U.S. 690 (1973); *United States ex rel. John* v. *Casscles,* 489 F. 2d 20 (2d Cir. 1973), cert. denied 416 U.S. 959 (1974). After reviewing the record of the state court proceeding, Judge Weinstein concluded that as to the question of the voluntariness of petitioner's waiver of his rights and the voluntariness of his confession, he had received a full and fair hearing. Under these circumstances and as to these issues Judge Weinstein properly declined to grant an evidentiary hearing. The state court's findings were entitled to a presumption of correctness and the District Court Judge should accept them. 28 U.S.C. § 2254(d); *Townsend* v. *Sain,* 372 U.S. 293 (1963).

Judge Weinstein further concluded, however, based upon his review of the record of the state court proceedings, that there was an issue which the state court had not fully considered, to wit, whether petitioner understood his rights and understood the implications of waiving them. Otherwise stated, whether he had acted knowingly and intelligently. On this issue, petitioner was accorded an

evidentiary hearing. The issue was resolved against petitioner and his petition was dismissed. The Second Circuit unanimously affirmed and denied petitioner's subsequent motion for reargument.

Once again, petitioner seeks to throw open for review the *facts* surrounding his confession. Although the petition makes the novel statement that petitioner "seeks review of a pattern of arrest" in New York homicide cases described by petitioner as the "two-step" process, petitioner never has and is not now mounting a constitutional challenge to a police procedure. The issue is whether on the facts of this case, petitioner has been denied any constitutional safeguards.

Statement of the Relevant Facts*

A. The Crime

On the afternoon of December 1, 1967, three gunmen entered the offices of the Leonard Electric Products Company located in the Bush Terminal Building, 67 34th Street in Brooklyn. They stole approximately $6,000 of the company's payroll. During the course of the robbery, Nathaniel Leonard, the company's president, was shot and killed. A company employee, Harold Abrams, was shot and critically wounded. Based upon descriptions provided by the company's employees, and upon subsequent investigation, petitioner was arrested on January 8, 1968.

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* Petitioner states in the first footnote to page 5 of the within petition that he has gone outside the record by culling facts from trials of his co-defendants held three years earlier. Petitioner's habeas corpus application, however, must be limited to a review of the record made by petitioner at his hearings and trial. This notwithstanding, petitioner establishes no convincing nexus between the supplemental facts pertaining to his co-defendants and the alleged deprivation of his constitutional rights.

B. Circumstances Surrounding Petitioner's Apprehension

The arrest was made by Detectives Frank Caltagirone and Frank Rinaldi of the 68th Precinct. They were assigned to the case on the date of the crime (H. 83).*

On January 8, 1968, at about 2:30 P.M., the two detectives went to a third floor rear apartment in a building located at 330 Greene Avenue in Brooklyn (H. 83-84). They knocked on the door and identified themselves. When no one responded, they forced the door open (H. 85).

The apartment was empty. When the detectives looked out of an open bedroom window, however, they saw that two men were being held at gunpoint by two officers who had been assigned to cover the rear yard (H. 85). The two suspects were petitioner and Willie Brigham.

C. Events Preceding Petitioner's Statement

The two were taken to the 68th Precinct, arriving at about 3:30 P.M. (H. 86). At the precinct, petitioner was asked if he had been on the premises of the Leonard Electric Company on December 1, 1967. Petitioner denied being there. According to the detectives, there was no further conversation with petitioner (H. 87).

At approximately 5:00 P.M. that day, petitioner was placed in a lineup at the precinct. He was identified by one of three Leonard Company employees. At about 5:45 P.M., Detective Rinaldi took petitioner to another lineup at the hospital where Harold Abrams was recuperating (H. 88). Abrams identified petitioner.**

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* The numbers in parentheses preceded by the letter "H" refer to the corresponding pages of the stenographic transcript of the *Huntley* hearing.

** In response to petitioner's application to suppress identification testimony, he was also given a *Wade* hearing. At its con-

(footnote continued on following page)

D. Taking of the Statement

Petitioner was returned to the precinct sometime between 6:00 and 7:00 P.M. (H. 88). At this time, petitioner first expressed to Detective Caltagirone his desire to tell the officers everything (H. 89, 122). Detective Caltagirone thereupon took out a form provided by the Police Department and carried by all officers (H. 90, 91, 103, 104). On the form was printed the constitutional warnings pursuant to the *Miranda* decision. The form also contained blank spaces in which the officer was to record the suspect's responses to each warning (H. 91).

Reading from this form and recording petitioner's responses, the detective advised petitioner of his constitutional rights. The detective told petitioner that he had the right to remain silent and that he did not have to say anything unless he chose to do so. Petitioner answered "yes" that he understood and his answer was recorded by the detective in the space provided. Petitioner was told that anything he said could be used against him in a court of law. When asked whether he understood that, he responded affirmatively. The answer "yes" was recorded. Petitioner was told that he had the right to an attorney present with him during any questioning then or in the future. In addition he was asked if he had an attorney. He answered "yes", the response petitioner had been making to indicate understanding. Petitioner was also told that in the event he could not afford a private attorney, the court would appoint one to represent him. Again petitioner affirmed his understanding (H. 92-95). Finally, petitioner was told that he could telephone an attorney (H. 108). Petitioner did not do so.

(footnote continued from preceding page)

clusion, the court excluded testimony concerning the lineup identifications because no attorney had been present, a requirement since eliminated. See *Kirby* v. *Illinois*, 406 U.S. 682 (1972). However, finding no taint in the identification procedure, the court ruled that the witnesses could make in-court identifications.

Detective Caltagirone then asked petitioner why he was willing to make a statement (H. 95). He replied: "I want to tell the truth because they crossed me" (H. 95). This answer was recorded by the detective on the form (H. 95). Petitioner was next handed the form, told to look it over and asked to sign it. He did so (H. 90, 96-97, 98-99). He then gave the officers a full statement of his participation in the robbery and shootings that had occurred at the Leonard Electric Company on December 1, 1967 (H. 111).

Detectives Caltagirone and Rinaldi wrote the statement down verbatim in their notebooks as petitioner spoke. The statement described petitioner's participation in the robbery and the shootings although endeavored to mitigate the circumstances surrounding the shootings.

Detective Caltagirone testified that the notation on the *Miranda* form which he used for petitioner indicated that petitioner had been advised of his rights at 7:10 P.M. (H. 99-100, 120). The detective acknowledged that the notebook in which the statement had been recorded contained a time notation of "6.4 P.M.," which the detective conceded would indicate that the statement was begun sometime between 6:40 and 6:49 P.M. (H. 124). He adamantly insisted, however, that petitioner had been advised of his rights before the statement was taken (H. 92, 123, 124, 125, 149, 151). Detective Caltagirone concluded that one of the two time notations was erroneous (H. 125, 127).*

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* Petitioner places much emphasis on whether the statement was one continuous narrative or whether some questioning was also utilized. According to petitioner's convoluted reasoning, the *Miranda* warnings could not have been administered at "6.4 P.M." if there had been questioning because the statement could not then have been completed by 7:00 P.M., the approximate time that an Assistant District Attorney was notified to come down to the precinct. The record, however, is entirely consistent with the statement having been completed in 20 to 30 minutes, the approximate time between "6.4 P.M." and 7:00 P.M.

Detective Rinaldi testified that he returned to the precinct with petitioner following the hospital lineup at about 6:30 P.M. (H. 154, 210, 211). The petitioner showed an eagerness to make a statement and so Detective Caltagirone, reading from a form provided by the Police Department, advised him of his constitutional rights (H. 154, 155, 164, 167, 168). Immediately thereafter, the form was handed to the petitioner who signed it (H. 155).

At approximately 6:45 P.M., after the petitioner had been warned of his rights, he made a statement fully outlining his participation in the crime (H. 156, 163, 166, 204-205, 211, 212, 215, 217, 218). Detective Rinaldi noted down the confession as the petitioner spoke (H. 160). The steno book in which he recorded petitioner's confession had a notation that the statement had been given beginning at 6:45 P.M. (H. 157, 169). An additional notation written in the margin next to the statement indicated that petitioner had been "advised of his rights" (H. 158, 160, 169).* Rinaldi testified that he was positive that petitioner had been warned of his rights before he gave the statement (H. 158).

A handwriting expert testified that the signature on the *Miranda* form was that of petitioner. Petitioner testified that he had an LSD induced amnesia and remembered nothing from the date of the crime to a point some two and half years later.

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* Petitioner engages in lengthy speculation that Detective Rinaldi could have written in the marginal notation shortly before testifying since his memo book was in his possession. The fact of possession was placed before the court. The court, however, credited the detective's testimony that the notation was made at the time petitioner made his statement. The memo book also contained the statement, among others, of co-defendant Wilson. That statement had no marginal notation and had been entered into evidence at Wilson's trial without any notation.

E. Events Subsequent To The Statement

At approximately 2:00 A.M. on January 9, 1968, while petitioner was at the precinct being booked, he was stricken with drug withdrawal symptoms. He had not previously exhibited those symptoms while in the presence of Detectives Caltagirone and Rinaldi or Assistant District Attorney Allatin (H. 101).* Petitioner was arraigned that morning at 9:00 A.M., after a short period of hospitalization for the withdrawal. A plea of not guilty was entered and the court ordered that counsel be appointed.

F. Petitioner's Period of Prolonged Hospitalization

On January 17, 1968, petitioner was transferred from the Queens House of Detention to the Kings County Hospital to undergo psychiatric observation. His condition was diagnosed as a "malingering psychosis" which subsequently developed into an induced or hysterical psychosis requiring his commitment to Matteawan State Hospital in March, 1968. He remained confined to Matteawan until 1970 although his hospital records indicated that in the month of his admission he was able to carry out work tasks in a responsible and well-behaved manner. Trial proceedings commenced in December, 1971, leading to the eventual entry of the judgment of conviction on September 15, 1972.

G. Proceedings In The District Court On The Writ

Based upon his review of the state court proceedings, Judge Weinstein concluded that: (1) the issue of whether the *Miranda* warnings were given before petitioner made his statement was fully probed at the state level and the state court's determination was fairly supported by the record; (2) the same conclusion was applicable to the issue of whether petitioner's statement was voluntary, i.e.,

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* Petitioner had been sufficiently competent to tell the Assistant District Attorney that he would not say anything more without an attorney.

whether the statement was the product of free will as opposed to coercion; (3) however, the state court did not adequately focus on whether petitioner's waiver of his rights was done knowingly and intellingently, i.e., whether he understood what his rights were, whether he understood the implications of waiving those rights and whether he had the mental capacity to waive them.

The Court continued that there were indicia in the record of the state court proceedings that the waiver was knowingly and intelligently made: petitioner did make an inculpatory statement; he eventually did invoke his right to remain silent; the police officers did testify that petitioner appeared normal and aware at the time; and, the trial court did make certain findings as to the level of petitioner's ability to comprehend (the ability to understand questions asked of him, to recollect events and to make rational responses). Although the Court considered these factors to weigh heavily against petitioner's claim that he had not knowingly and intelligently waived his rights, the Court was of the opinion that the matter should be tested at a hearing *de novo* because the state court had not adequately focused on the issue.* At the conclusion of the hearing, the Court credited the psychiatric testimony adduced and the expert's opinion that at the time petitioner confessed, he was fully capable of acting knowingly and intelligently.

Reasons for Denying the Writ

The case at bar, shorn of the speculations infused into it by petitioner, raises no issues other than the factual issue, repeatedly tested and scrutinized, of whether petitioner voluntarily, knowingly and intelligently waived his right to counsel and his privilege against self-incrimination.

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* No psychiatric testimony had been introduced at the *Huntley* hearing.

The factual pattern is not complicated. Petitioner was a late suspect in the investigation of the Leonard Electrical Company robbery and shootings. At the time of his arrest with Brigham, he denied involvement. As testified to by the investigating detectives, questioning was not pursued. However, after petitioner appeared in two lineups, and without questioning, he volunteered to give a statement. His statement implicated his subsequent codefendants, some or all whom petitioner believed had "crossed" him. The statement also attempted to divest petitioner of any intent to shoot the several victims.*

Petitioner's statement was preceded by a statement of his rights and petitioner's waiver thereof. This fact was found by both the trial court at the *Huntley* hearing and then by the jury after evaluating the testimony. Petitioner acted normally and spoke coherently. He continued to do so when interviewed by the Assistant District Attorney. He suffered withdrawal symptoms the morning of the next day but was present for arraignment at 9:00 A.M. that morning.

Petitioner's psychiatric history began some two weeks thereafter during the course of his confinement in the Queens House of Detention.* At that time he was diagnosed as a malingerer. Subsequently, however, he was able to induce an hysterical psychosis warranting his commitment to Matteawan State Hospital. In an effort to remove any doubt that no psychological infirmity afflicted petitioner's ability to confess knowingly and intelligently, the District Court held a *de novo* evidentiary hearing on that issue.

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* According to the statement, petitioner's gun discharged accidentally each time he was physically grabbed by a victim.

* Petitioner had never previously been under any form of mental care.

Petitioner has had as many full and comprehensive probes into the alleged denial of his rights as would conceivably be necessary to extract some convincing evidence of a violation. Petitioner should not be permitted to go further through speculation and phylacteric invocations of "two-step" processes that seek to avoid the conclusion that petitioner was accorded all of the safeguards to which he was constitutionally entitled.

POINT I

The issue of whether petitioner confessed voluntarily, knowingly and intelligently was fully probed and developed at the state level and the state court's conclusions were fairly supported by the record.

Pursuant to *People* v. *Huntley*, 15 N Y 2d 72, 204 N.E. 2d 179 (1965), New York's implementation of *Jackson* v. *Denno*, 378 U.S. 368 (1964), the trial court held a hearing on the question of the voluntariness of the inculpatory statement made by petitioner. At the conclusion of this hearing, the trial court found that petitioner had been advised of his rights before he made the inculpatory statement attributed to him; that he was in a normal condition and fully aware of the surrounding circumstances at the time and place he made the statement; and that, therefore, the "prosecution has established beyond a reasonable doubt that [petitioner's] statement in which he is alleged to have confessed to his participation in the commission of the crime was voluntarily made and is therefore admissible in evidence; it would be submitted as a question of fact for the jury to also pass upon the voluntariness of the statement" (H. 262).

Petitioner's challenge to these findings raises a question concerning the weight to be given the trial court's conclusions and whether petitioner is now entitled to an evidentiary hearing into questions of fact that have already been resolved against him in the state court.

Concerning the weight to be given the trial court's conclusions, in a federal habeas corpus proceeding, the purely factual findings of a *Huntley* hearing judge are presumed correct and the petitioner has the burden of demonstrating by convincing evidence that the findings were erroneous. *LaVallee* v. *Delle Rose*, 410 U.S. 690 (1973); *United States ex rel. John* v. *Casscles*, 489 F. 2d 20 (2d Cir. 1973), cert. denied 416 U.S. 959 (1974); *United States ex rel. Regina* v. *LaVallee*, 504 F. 2d 580 (2d Cir. 1974); *United States ex rel. Coleman* v. *Mancusi*, 423 F. 2d 985 (2d Cir. 1970), cert. den. 400 U.S. 842 (1970). In the case at bar, petitioner has not met his burden of demonstrating error in the findings that his confession was voluntary.

(1) Petitioner was advised of his rights before the police took his inculpatory statement.

The following facts emerge from the record. Petitioner was apprehended at approximately 2:30 P.M. on January 8, 1968. After he and the two officers, Caltagirone and Rinaldi, arrived at the police station, the first of two lineups was conducted. Thereafter, petitioner and officer Rinaldi travelled to the hospital where Mr. Abrams, a witness who had been seriously wounded during the robbery, was confined. A second lineup was held at Mr. Abrams' bedside. After the hospital lineup, petitioner and officer Rinaldi returned to the police station, arriving at approximately 6:30 P.M.

Officer Caltagirone testified that upon petitioner's return from the hospital, he asked petitioner if he wanted to tell him what happened and petitioner replied that he wanted to "tell the truth" because his accomplices had "crossed" him. Thereupon, officer Caltagirone read petitioner's rights to him from a written form and asked petitioner, after the recitation of each right, whether he understood that right; petitioner answered "yes" each time and his responses were recorded on the warning form. Both the officer and petitioner then signed the form

(petitioner claimed that the signature was not his, but a handwriting expert testified that it was) and the officer heard and recorded petitioner's statement in a book. In that statement, petitioner admitted taking part in the robbery and shooting Mr. Leonard and Mr. Abrams, but claimed that the shootings were accidental.

An Assistant District Attorney was called to question petitioner further. This time petitioner refused to speak without an attorney present. The next morning petitioner began to exhibit narcotics withdrawal symptoms.

What also emerged from the record was the fact that the form from which petitioner's rights were read to him bore the notation "7:10 P.M." as the time when petitioner was given the *Miranda* warnings. The book in which petitioner's statement was recorded bore the notation "6:4 P.M." as the time when the statement was taken. Officer Caltagirone conceded that "6:4" denoted a time somewhere between 6:40 and 6:49 P.M., but insisted that petitioner was advised of his rights before the statement was taken and that he had made an error in noting the time. Officer Rinaldi, who was present at the time, also testified that petitioner's statement was taken after he had been informed of his rights.

This factual dispute was resolved on the basis of the trial court's perception of the credibility of the various witnesses. Therefore, since there was evidence to support this finding and "[s]ince the credibility of [the] testimony and the weight to be extended to it were matters to be determined by the trial judge, who observed the witnesses [it cannot be said] that the court's findings were clearly erroneous . . .," even if some other court might have reached another result. *United States ex rel. Fitzgerald* v. *LaVallee,* 461 F. 2d 601, 604 (2d Cir. 1972).

(2) Petitioner's statement was freely and voluntarily made.

The standard of measuring whether a confession was voluntarily given has been defined as whether pressure was exerted upon the petitioner to confess through threats, the infliction of fear or pain, or the making of inducements and promises. *Darwin* v. *Connecticut,* 391 U.S. 346 (1968); *Greenwald* v. *Wisconsin,* 390 U.S. 519 (1968); *Fikes* v. *Alabama,* 352 U.S. 191 (1957). In the case at bar, there was no evidence presented of physical or psychological coercion. Furthermore, the use of any such tactics was specifically denied by both Detectives Caltagirone and Rinaldi.*

The detectives further testified that petitioner preceded his statement with an explanation of why he wanted to confess. He stated that he wanted to tell the truth because his accomplices had crossed him. It was logical for petitioner to have concluded that he was going to take full responsibility for the crime since, aside from Brigham, with whom he was arrested, none of the other participants to the crime appeared to be in police custody. Since the police had been able to find petitioner, it was further reasonable for him to conclude that the others had traded the information for their freedom.

(3) Petitioner knowingly and intelligently waived his privilege against self-incrimination and his right to have retained or appointed counsel at the interrogation.

This argument will be developed under Points II and III, *infra.*

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* Photographs of petitioner at the time he was booked including a photograph of petitioner in the nude constituted corroboration of the witnesses' testimony that no physical force was used (H. 246).

POINT II

The District Court properly limited the scope of the evidentiary hearing to only those issues which had not been adequately developed at the state court hearing.

In *Townsend* v. *Sain*, 372 U.S. 293, 312-13 (1963), this Court stated that "a federal evidentiary hearing is required unless the state-court trier of fact has after full hearing reliably found the relevant facts. *Townsend* v. *Sain's* list of circumstances which mandate the holding of an evidentiary hearing has been incorporated into 28 U.S.C. § 2254(d). According to this subsection, a state court's factual determinations, evidenced by written findings, are entitled to a presumption of correctness in a subsequent federal habeas corpus proceeding unless the existence of one of the *Townsend* categories is established.

As set forth under Point I of this brief, the District Court concluded that petitioner had been accorded a full and fair hearing at the state court level, resulting in reliable findings, that petitioner was advised of his rights prior to confessing and that he confessed freely, without coercion of any sort. A review of the evidence at the *Huntley* hearing fully supports the District Court's interpretation of the comprehensiveness of that proceeding on these issues. Therefore, the Court correctly accepted the facts as found.

The Court was not persuaded, however, that the State Court hearing adequately explored the question of whether petitioner had the mental capacity to knowingly and intelligently waive his rights. Accordingly, a hearing was ordered *de novo* on this issue. On the authority of *Townsend* v. *Sain, supra,* and 28 U.S.C. § 2254(d), the Court properly confined the scope of the hearing to the one issue which required further elucidation.

Concerning that issue, the Court heard expert psychiatric testimony that petitioner was mentally competent at the time he made his statement. The psychiatrist based his opinion upon a personal examination of petitioner in 1971, his review of petitioner's medical records and other circumstances surrounding petitioner. The District Court credited the psychiatric testimony and concluded that the question of waivers knowingly and intelligently made had been established beyond a reasonable doubt.

POINT III

The District Court properly concluded that petitioner voluntarily, knowingly and intelligently waived his right to counsel.

Upon reviewing the evidence at the state court hearing, the District Court found that the issue of petitioner's waiver of his right to counsel had been fully explored, and reliable findings made, to the following extent: (a) that petitioner was advised of his right to counsel before he made his statement; and (b) that when so advised, he declined to exercise his right.

The evidence at the *Huntley* hearing was that Detective Caltagirone read the following to petitioner: "You have the right to have an attorney present with you during any questioning now or in the future. Do you have an attorney?" (H. 93). Petitioner answered "yes", as he had done to indicate understanding in response to the previous statements of his rights.* Caltagirone advised petitioner of his right to telephone an attorney but petitioner did not do so (H. 108). Caltagirone also advised petitioner of his right to a court appointed attorney. Rather, petitioner said that he wanted to make a statement because he had been "crossed".

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* Detective Rinaldi testified that it was *not* his understanding of the answer that petitioner was saying he had an attorney.

Consequently, the evidence at the state court level established both the presentation to petitioner of his right to counsel and his voluntary refusal to exercise it. The following day, at arraignment, the court appointed counsel.

The District Court, having properly relied on the state court's findings to the extent indicated, then went on to hold a hearing to determine whether petitioner had been mentally capable of understanding his right to counsel and understanding the implications of waiving that right. As demonstrated under Point II, *supra*, the evidence supported the Court's finding of mental competence.

POINT IV

Petitioner has failed to meet his burden of demonstrating by convincing evidence that the state court's findings were erroneous.

Petitioner's proof will be treated seriatim:

(1) Delayed arraignment. Petitioner raised the issue of the timeliness of the arraignment as bearing upon voluntariness for the first time on appeal to the Second Circuit. Consideration of the argument was, therefore, precluded by the doctrine of exhaustion of remedies. Petitioner may present to the federal courts only those claims which he has urged before the state forum. 28 U.S.C. § 2254(b)(c); *Picard* v. *Connor*, 404 U.S. 270 (1971); *Wilson* v. *Fogg*, 571 F. 2d 91 (2d Cir. 1978). The state courts were never given the opportunity to rule on whether there was an undue delay in arraignment and whether such delay persuasively supported petitioner's claim of involuntariness.

In any event, the length of time before arraignment, even when unnecessary, does not make a confession involuntary in and of itself. *Crooker* v. *California*, 357 U.S. 433 (1958); *Stroble* v. *California*, 342 U.S. 181 (1957); *United States ex rel. Clinton* v. *Denno*, 309 F. 2d 543 (2d Cir. 1962), cert. denied 372 U.S. 938.

In the case at bar, the facts do not support a claim of undue delay. Petitioner was a late entry into the ranks of suspects for the crime. Immediately after his involvement began crystallizing at the lineups, he stated his willingness to make a statement. Thereafter, events proceeded rapidly. The statement was taken, he was interviewed by the Assistant District Attorney and he was booked. A short period of hospitalization intervened (for withdrawal symptoms) whereupon he was arraigned at 9:00 A.M. that morning.

(2) Speculations unsupported by the record.

Petitioner urges that because certain co-defendants alleged that they were the victims of police intimidation and threats, that the voluntariness of petitioner's confession is thereby circumspect.* However, there was no evidence of improper police tactics having been practiced on petitioner. In addition to the fact that the co-defendants' allegations lack any probative value here, those very allegations were never substantiated. Possessed of an equivalent disregard of fact is petitioner's non sequitur that because the police wanted to obtain confessions from the other suspects they must have violated petitioner's rights in obtaining his confession.

(3) Petitioner's claim that he was under the influence of drugs when he confessed.

The issue raised by petitioner's reference to drug usage and withdrawal symptoms in the early hours of January 9 is whether he had been incapable, because of his physical condition, of giving a voluntary confession. The issue was resolved against petitioner at the state court hearing. The

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* Petitioner refers to the testimony of certain co-defendants during their 1969 trials.

court credited the police officers' testimony that petitioner appeared normal and aware and discredited petitioner's claim that drug ingestion had rendered him incompetent. The court made findings as to the level of petitioner's understanding, taking into consideration his memory, his ability to understand the questions he was asked and his ability to make an accurate statement about his acts. The Court also took into account the fact that petitioner did subsequently invoke his right to silence. The District Court properly accorded the state court's conclusions the presumption of correctness conferred by 28 U.S.C. Section 2254(d). Petitioner has not disputed those findings with convincing evidence to the contrary.*

In conclusion, neither singly nor in tandem do the above components of petitioner's proof convince that the findings that petitioner confessed voluntarily, knowingly and intelligently were anything but correct.

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* Interestingly, petitioner was later to challenge the validity of the *Huntley* hearing on the ground that he was under the influence of drugs then as well. Considering the fact that petitioner coherently testified in his own behalf during the hearing, that argument has not been pursued beyond the initial *pro se* papers.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York
April 13, 1979

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1978

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v.

EUGENE LEFEVRE, *Superintendent,*
Clinton Correctional Facility, New York,

Respondent.

REPLY BRIEF FOR PETITIONER

THOMAS J. ACQUILINO, JR.
OGDEN N. LEWIS
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In The

Supreme Court of the United States

October Term, 1978

No. 78-1459

ERNEST FEELINGS,

Petitioner,

v.

EUGENE LeFEVRE, *Superintendent,*
Clinton Correctional Facility, New York,

Respondent.

REPLY BRIEF FOR PETITIONER

This reply brief is submitted on behalf of petitioner for the purpose of addressing only one important point which has been misstated by respondent in its brief in opposition ("Res. Br.").

Respondent contends that petitioner "seeks to throw open for review the *facts* surrounding his confession" (Res. Br. at 4, emphasis in original).

This is not accurate. What petitioner seeks is review of the District Court's failure to have considered the full factual record at all. Petitioner is seeking to have all the relevant facts *opened for the first time* in a Federal forum.

Petitioner's point is thus a threshhold one: that the District Court in conducting its habeas review did not have all the facts before it, for the reason that it conducted its review of the state court judgment of conviction only on

petitioner's trial record and not on that of his co-defendants as well.

Petitioner also contends that this would have made a difference, and that if the District Court had had both records before it, it would have reached a different conclusion than it did (a) about whether the state court record was sufficient to have permitted the exclusion of independent testimony in the habeas proceeding except on the limited issue of petitioner's psychiatric state and (b) whether "the fact-finding procedure employed by the state court" gave petitioner "a full and fair hearing" on the issue of voluntariness itself. *Townsend* v. *Sain*, 372 U.S. 293, 313 (1963).

But regardless of whether a review of both records would or would not have made a difference, petitioner contends that at least he was entitled to have the District Court review both of them, not just one of them, in assessing the facts.

ARGUMENT

Point I

The Record of the Trial of Petitioner's Co-Defendants is Properly a Part of the Record in Habeas Review and Should Have Been Considered by the District Court Below

Without citing authority, respondent asserts (Res. Br. at 4, n.*) that "[p]etitioner's habeas corpus application . . . must be limited to a review of the record made by petitioner at his hearings and trial."

This is not so. Where related state court proceedings contain probative evidence on a petitioner's habeas claim, the record of such proceedings should be considered by the Federal court as part of its independent review. *Dale* v. *Williams*, 327 F.Supp. 381 (E.D.Pa. 1971), *rev'd on other grounds*, 459 F.2d 763 (3rd Cir. 1972).

There a writ of habeas corpus was sought on the grounds that the petitioner's conviction had been improperly obtained on the perjured testimony of a co-defendant who had turned state's witness. Substantiation of the alleged perjury was claimed to be contained in the record of the co-defendant at the hearing on the latter's guilty plea. District Judge Weiner, in ruling on the habeas petition, properly looked to both the state court record of the petitioner and the separate record of the co-defendant. 327 F.Supp. at 382. Only by so doing was he able to reach the conclusion that the "State court record is adequate for a determination of the merits of the [petitioner's] contention and no evidentiary hearing is required." *Ibid.*

Similar consideration of a co-defendant's record was relied upon in *United States ex rel. Darrah* v. *Brierley*, 415 F.2d 9 (3rd Cir. 1969), where the court upheld the denial of an independent hearing on a habeas petition because the petitioner had "testified for the state in the trial of a co-defendant wherein he admitted his implication" in the crimes with which he was charged. 415 F.2d at 12 (emphasis omitted).*

Here petitioner was accorded neither such a review of his co-defendants' record, as was done in *Dale*, nor was he given an evidentiary hearing on the full facts of waiver. While the District Court states that a "full hearing" was held on this issue (13a), the transcript in the District Court shows that the evidence adduced was testimony on petitioner's mental competence. Except for petitioner's statements of inability to recollect most of the events surrounding his arrest, there was no evidence as to all the other elements which this Court has recently reaffirmed should be considered to support a finding of voluntary, knowing and intelli-

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* Indeed, the completeness of the state court record is essential if a habeas petitioner is to be provided with "the equivalent of a full and fair evidentiary hearing." *Reeves* v. *Henderson*, 380 F.Supp. 661, 662 (W.D.La. 1974). *Accord, Griswold* v. *Eyman*, 452 F.2d 923, 924-25 (9th Cir. 1971); *Allison* v. *Holman*, 326 F.2d 294, 296-97 (5th Cir. 1963), *cert. denied*, 376 U.S. 957 (1964).

gent waiver. *North Carolina* v. *Butler*, ____ U.S. ____, 47 U.S.L.W. 4454 (1979). Despite its length, the opinion of the District Court below contains virtually no discussion of any facts established at that hearing. Its conclusion (13a-14a) is entirely summary on the quesiton of waiver.*

Point II

The Facts As Shown in the Full State Court Record Are Inconsistent With the Voluntary, Knowing and Intelligent Waiver of Petitioner's Rights

If the full record is considered, as it should have been below, it becomes clear that the District Court would have had a *different* set of facts before it than it thought it had.

Because the District Court had only petitioner's 1972 record, and the testimony on petitioner's mental competence, it had the clear impression that petitioner's identity was never in doubt by the police on the day of his arrest. There was nothing in the 1972 record to contradict or cast doubt on the prosecution's testimony that the confidential tip which led to petitioner's arrest had disclosed petitioner's link to the crime, and that the police were not only aware of this link but made their awareness known to petitioner at the time he was in custody (1972 R85-92, 213-14**). Respondent stresses that a confession by petitioner in such circumstances was only "logical" (Res. Br. at 15).

The District Court appears to have been persuaded by the same logic. The 1969 record, however, adds critical

* The District Court merely states that, "In addition to the records of proceedings in the state [sic], the court heard Dr. Raymond Chaitin, a psychiatrist, the petitioner and the petitioner's brothers. The court credits the testimony of the psychiatrist and finds that [waiver has] been established beyond a reasonable doubt" (14a). Dr. Chaitin was the state's psychiatric expert at petitioner's 1972 trial (Main Brief at 14). Only one brother of the petitioner testified, and solely on the issue of his impressions of petitioner's mental stability.

** References to the record are as in petitioner's Main Brief.

details which are wholly absent from both the 1972 record and from the District Court hearing and which undermine the "logic" of petitioner's "voluntary" waiver.

The 1969 record indicates that the police did not know petitioner's identity when they arrested him and that they found him with Brigham by chance (1969 R85, 91, 312-13). If the 1969 record is accurate, petitioner was thus arrested without a warrant (1969 R754) and without probable cause as to him.*

Similarly the 1969 record does not support the idea that petitioner "logically" volunteered a confession because he realized, without police interrogation, that he had been crossed. Petitioner's Main Brief (at 14-16) has set forth the contrasting testimony of the police in 1969 and 1972 about how petitioner's "verbatim" statement was obtained. The 1969 record also shows that as of the time of petitioner's arrest, the police believed they were dealing with a crime committed by at most five persons, of whom they had positive leads for only four (Brigham, John Wilson and the two Fillyaws). However, the 1969 record, to the extent it reveals anything, suggests that the fifth individual was not petitioner but another suspect, Herman McNeil (1969 R1295, 1304).**

* The police had a justification for keeping petitioner in custody because of the drugs found in the Greene Avenue apartment (1969 R12-13b). The presence and use of drugs by both petitioner and Brigham that day would also have given petitioner ample motive to try to escape from the apartment and to be generally apprehensive of police custody and interrogation, whether he had been a suspect in the Leonard Electrical Company robbery or not.

** The 1969 record shows that Morse Fillyaw had told George Wilson, the original informer as to his cousins, about the crime on December 3, 1967, but he would not tell Wilson who had done the shooting (1969 R1315). Wilson had told the police the next day about the likely involvement of John Wilson, Morse Fillyaw and Herman Fillyaw, and he also mentioned "Randy" and "MN" to them (1969 R1295, 1304). The police later traced "Randy" to being Willie Brigham through their interview with Johnnie Mae Zimmerman on December 8 (1969 R296). But the fifth suspect, "MN" remained unknown, although the initials square with the name McNeil. From

In short, petitioner was being held by the police on essentially an everything-to-win, nothing-to-lose basis. When petitioner was then identified by two of the four individuals who witnessed the line-ups, the police may well have believed they had found their fifth suspect. Hence the motivation to obtain a confession from petitioner whether or not he was an innocent or even a framed victim of Brigham's arrest.

The foregoing facts, and those described at greater length in petitioner's Main Brief, turn the largely untroubled 1972 record which the District Court reviewed into a record which, at the least, calls for further scrutiny by the District Court.

It is a record which, in material respects, closely resembles the factual situation in *United States* v. *Middleton*, 344 F.2d 78 (2nd Cir. 1965). There, although the case involved Rule 5(a) of the Federal Criminal Rules, the use of a suspect's confession at trial was reversed when the delay in arraignment, nowithstanding *Miranda*-type warnings, had been occasioned for the "single objective—to obtain a flat admission from the [suspect's] lips" that he had committed the crime for which he had been arrested. 344 F.2d at 82.

Nor was the use of the line-ups in this case dissimilar, given the circumstances of petitioner's arrest, from the use of the lie detector test in *Mallory* v. *United States*, 354 U.S.

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the 1969 record, the police did not know of the involvement of any sixth person until the confessions were taken.

McNeil, while indicted in 1968 with petitioner and the other four, remained a fugitive until after petitioner's trial in 1972. He was subsequently arrested, tried and found guilty. No transcript of his trial has been located despite inquiries by the undersigned to his attorney, the Kings County court reporters and the trial judge. There is no record of any appeal by McNeil of his conviction. The absence of any record of the testimony at McNeil's trial is all the more reason that the review accorded petitioner below was inadequate (*see* Point I).

449, 450-451, 455 (1957). And here it is questionable, from the 1969 record at any rate, whether the police had probable cause to arrest petitioner in the first place for the crime for which he was booked the following morning, after his alleged confession.

Respondent challenges that the record in this case rises to the level of a challenge to New York's two-step arrest procedures, at least as applied to petitioner. Those procedures, however, constituted essentially the license for the police to ignore the need to arraign petitioner promptly on any charge, even that of possession of the drugs found in the Greene Avenue apartment. Had a formal arrest of petitioner been made, even if after the line-ups, some meaningful safeguards might have been interposed to protect against the possibility that petitioner was arrested by mistake and convicted *over four years later*, principally on the basis of a confession which may well not have been voluntary.

Dated: New York, New York
May 4, 1979

Respectfully submitted,

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Supreme Court, U. S.
FILED
MAR 21 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1459

ERNEST FEELINGS,

Petitioner,

v.

EUGENE LEFEVRE, *Superintendent,*
Clinton Correctional Facility, New York,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Statement

This Supplemental Appendix sets forth the respective judgments and orders of the United States District Court for the Eastern District of New York and the United States Court of Appeals for the Second Circuit filed in this action.

Dated: New York, New York
March 27, 1979

Respectfully submitted,

THOMAS J. AQUILINO, JR.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *ex rel.*
ERNEST FEELINGS,

Petitioner,

—against—

EUGENE LEFEVRE, *Superintendent, Clinton Correctional Facility, New York,*

Respondent.

JUDGMENT

76-C-1862

A memorandum and order of Honorable Jack B. Weinstein, United States District Judge having been filed on March 22, 1978, dismissing petition for writ of habeas corpus and denying a Certificate of Probable Cause for Appeal, it is

ORDER and ADJUDGED that the petition is dismissed and the issuance of a Certificate of Probable Cause for Appeal is denied.

/s/ LEWIS ORGEL
Clerk

Dated: Brooklyn, New York
March 22, 1978

FILED
IN CLERK'S
OFFICE
U.S. DISTRICT
COURT, E.D., N.Y.
MAR. 23 1978

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 21st day of December, one thousand nine hundred and seventy-eight.

Present:

HONORABLE WILFRED FEINBERG

HONORABLE WILLIAM H. MULLIGAN

HONORABLE MURRAY I. GURFEIN

Circuit Judges,

UNITED STATES OF AMERICA, *ex rel.* ERNEST FEELINGS, *Petitioner-Appellant,* *—against—* EUGENE LEFEVRE, *Superintendent, Clinton Correctional Facility, New York,* *Respondent-Appellee.*	78-2089

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is AFFIRMED on the opinion of Judge Weinstein dated March 22, 1978.

/s/ WILFRED FEINBERG
Wilfred Feinberg

/s/ WILLIAM H. MULLIGAN
William H. Mulligan

/s/ MURRAY I. GURFEIN
Murray I. Gurfein

CIRCUIT JUDGES

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-second day of February, one thousand nine hundred and seventy-nine.

Present:

HONORABLE WILFRED FEINBERG
HONORABLE WILLIAM H. MULLIGAN
HONORABLE MURRAY I. GURFEIN
CIRCUIT JUDGES,

ERNEST FEELINGS, *Petitioner-Appellant,* v. EUGENE LEFEVRE, *Superintendent,* *Clinton Correctional Facility,* *Respondent-Appellee.*	78-2089

A petition for a rehearing having been filed herein by Ernest Feelings, pro-se,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 16th day of March, one thousand nine hundred and seventy-nine.

ERNEST FEELINGS, *Appellant,* v. EUGENE LEFEVRE, *Superintendent.*	78-2089

A motion having been made herein by Appellant pro se for reconsideration on the basis of *pro se* letters dated February 22 and 26, 1979

Upon consideration thereof, it is

Ordered that said motion be and it hereby is DENIED.

/s/ WILFRED FEINBERG
Wilfred Feinberg

/s/ WILLIAM H. MULLIGAN
William H. Mulligan

/s/ MURRAY I. GURFEIN
Murray I. Gurfein

CIRCUIT JUDGES